LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 31

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

vs.

WESTINGHOUSE ELECTRIC CORPORATION.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 4, 1958
CERTIORARI GRANTED APRIL 1, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 485

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

vs.

WESTINGHOUSE ELECTRIC CORPORATION.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Proceedings in the Court of Appeals of the State of New York		
Statement	A-1	1
Record from the Supreme Court of the State of New York, Appellate Division, First Judicial Department	1	2
Statement under Rule 234	1	2
Proceedings in the Supreme Court of the State of New York, County of New York	2	3
Notice of appeal to the Appellate Division	2	3
Order appealed from	5	4
Notice of motion	8	5
Petition of James B. Carey, read in support of motion (excerpts)	10	7
Exhibit 5—Letter from R. G. Pumphrey to Mr. Robert Nellis, dated September 15, 1958	40	16
Exhibit 6—Letter from R. G. Pumphrey to Mr. Herbert Schmertz, dated September 22, 1958	42	17

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 19, 1963.

	Original	Print
Proceedings in the Supreme Court of the State of New York, County of New York—Continued		
Notice of motion—Continued		
Petition of James B. Carey, read in support of motion (excerpts)—Continued		
Exhibit 7—Letter from Herbert Schmertz to Messrs. Ellis Hockenberry and R. G. Pumphrey, dated September 26, 1958	44	18
Answer to petition (excerpts)	53	20
Affidavit of Clark C. Frame, read in opposition to motion	58	22
Affidavit of K. H. Smith, read in opposition to motion	65	26
Reply affidavit of Ellis Hockenberry, read in support of motion (excerpts)	93	34
Sur-reply affidavit of K. H. Smith, read in opposition to motion	111	39
Exhibit A—Step 1 Nature of Grievance	115	41
Opinion, McGivern, J.	116	42
Stipulation as to exhibit filed in the Supreme Court of the State of New York, Appellate Division, First Department	128	50
Stipulation waiving certification	130	51
Notice of appeal to Court of Appeals	131	51
Order of modification of Appellate Division appealed from	134	52
Opinion of Appellate Division, Steuer, J.	136	54
Opinion, dissenting in part, of the Appellate Division, Eager, J.	145	60
Stipulation dispensing with printing of exhibit	149	62
Stipulation waiving security	150	63
Stipulation waiving certification of record to Court of Appeals	151	64
Clerk's certificate (omitted in printing)	152	64
Opinion, Per Curiam of the Court of Appeals	153	65
Opinion, dissenting in part, Fuld, J.	156	68
Remittitur to the Supreme Court of the State of New York	159	69

	Original	Print
Order making judgment of the Court of Appeals the judgment of the Supreme Court	164	71
Stipulation and addition to record	166	73
Agreement between Westinghouse Electric Corporation and International Union of Electrical, Radio and Machine Workers (AFL-CIO), effective October 1, 1950	169	77
Order allowing certiorari	170	78

[fol. A-1]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter

of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O., Petitioner-Respondent,

—against—

WESTINGHOUSE ELECTRIC CORPORATION, Respondent-Cross-Appellant.

STATEMENT

This is an appeal by James B. Carey, as President of International Union of Electrical, Radio and Machine Workers, A. F. L.-C. I. O., and a cross-appeal by Westinghouse Electric Corporation from an order of modification of the Appellate Division, First Department, filed in the office of its Clerk on December 14, 1961 and entered in the office of the Clerk of the County of New York on December 26, 1961, reversing in part and affirming in part a final order entered in this proceeding on April 18, 1961, in the office of the Clerk of the County of New York. The final order entered at Special Term dismissed in part and granted in part a petition to compel arbitration. The Appellate Division modified the final order by reversing a part thereof which granted relief to petitioner, by affirming a part thereof which denied relief to petitioner and by affirming a part thereof which granted relief to petitioner.

There has not been any change of parties or attorneys since the appeal to the Appellate Division.

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O., Petitioner-Appellant-Respondent,

against

WESTINGHOUSE ELECTRIC CORPORATION, Respondent-Respondent-Cross-Appellant.

STATEMENT UNDER RULE 234

This proceeding was brought to compel arbitration of certain grievances pursuant to the arbitration provisions of a collective bargaining agreement between the parties.

The proceeding was commenced June 9, 1960, in the Supreme Court, New York County, by service of petition and notice of motion. Respondent served its answer opposing the petition on October 11, 1960. Mr. Justice Owen McGivern, by an order made at Special Term of the Supreme Court, New York County, and entered April 17, 1961, granted the petition with reference to grievances known as National Appeal Grievances Nos. 1971-C, 2547-C and 2079-A and denied the petition with reference to the grievance known as National Appeal Grievance No. 2286-G. Petitioner served and filed a notice of appeal from said order on May 15, 1961. Respondent served and filed a notice of cross-appeal from said order on May 23, 1961.

The names of the original parties to this proceeding are set forth in the title. There has not been any change in the parties or attorneys.

[fol. 2]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O., Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION, Respondent.

NOTICE OF APPEAL—May 15, 1961

Sirs:

Please take notice that the above named petitioner, James B. Carey, as President of International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O., hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, from so much of the final order made in the above entitled proceedings, dated April 17, 1961 and entered in the Office of the Clerk of the County of New York on April 18, 1961, as denies that part of petitioner's motion for an order directing that arbitration proceed in the manner provided for in the arbitration agreement contained in the collective bargaining agreement between petitioner and [fol. 3] respondent of the unsettled grievance known as National Appeal Grievance, No. 2286-G.

Yours, etc.

Lieberman, Katz & Aronson, Attorneys for Petitioner, 1501 Broadway, New York 36, New York.

Dated: New York, New York, May 15, 1961.

To:

Clerk of the County of New York.

Cravath, Swaine & Moore, Esqs., Attorneys for Respondent, 15 Broad Street, New York, New York.

[fol. 5]

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Court House thereof, Pearl and Centre Streets, Borough of Manhattan, City of New York, on the 17th day of April, 1961.

Present: Hon. Owen McGivern, Justice.

ORDER APPEALED FROM—April 17, 1961

The petitioner having moved this Court by notice of motion dated the 8th day of June, 1960, for an order directing that arbitration proceed, in the manner provided for in the arbitration agreement contained in the collective bargaining agreement between the parties, of the unsettled grievances known as National Appeal Grievances Numbers 1971-C, 2547-C, 2079-A and 2286-G, and that said order shall further provide that within ten days of the service of a copy of said order with notice of entry thereon, the parties shall proceed with the selection of an arbitrator and with arbitration in accordance with the Voluntary Arbitration Rules of the American Arbitration Association, except insofar as said Rules have been modified by the collective bar- [fol. 6] gaining agreement; and said motion having duly come on to be heard on the 11th day of October, 1960, and Lieberman, Katz & Aronson, attorneys for the petitioner, having appeared in support of said motion, and Cravath, Swaine & Moore, attorneys for respondent, having appeared in opposition thereto;

Now, on reading and filing the aforesaid notice of motion dated the 8th day of June, 1960, the petition of James B. Carey, verified the 6th day of June, 1960, and the reply affidavit of Ellis Hockenberry, sworn to the 23rd day of September, 1960, together with proof of service thereof, all submitted in support of said motion, and answer by respondent to the petition, verified by Albert R. Connelly on the 10th day of October, 1960, the affidavits of Clark C. Frame, sworn to the 7th day of July, 1960, G. M. Nicholson, sworn to the 29th day of June, 1960, W. W. Heimbach, sworn to the 8th day of July, 1960, K. H. Smith, sworn

to the 29th day of June, 1960, K. H. Smith, sworn to the 7th day of October, 1960, and John F. Hunt, Jr., sworn to the 10th day of October, 1960, all submitted in opposition thereto; and upon the decision of the Court filed herein,

It is now, on motion of Lieberman, Katz & Aronson, attorneys for petitioner,

Ordered, That the motion, insofar as it relates to the unsettled grievances known as National Appeal Grievances [fol. 7] Numbers 1971-C, 2547-C and 2079-A, be, and the same hereby is, in all respects granted; and it is further

Ordered, That the motion, insofar as it relates to the unsettled grievance known as National Appeal Grievance Number 2286-G, be, and the same hereby is, denied; and it is further

Ordered, That arbitration be had of the issues involved in the unsettled grievances known as National Appeal Grievances Numbers 1971-C, 2547-C and 2079-A, as requested by the Union, which have arisen under a collective bargaining agreement, and shall proceed between International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O., petitioner Union, and Westinghouse Electric Corporation, respondent, in the way and manner set forth and provided for in the collective bargaining agreement referred to in the aforesaid petition, within ten (10) days from the date of service of a copy of this order with notice of entry thereon.

Enter

O. McG, J.S.C.

[File endorsement omitted]

[fol. 8]

In Supreme Court of the State of New York

County of New York

Notice of Motion—June 8, 1960

Sir:

Please take notice that upon the annexed petition of James B. Carey, dated the 6th day of June, 1960, and the

annexed exhibits and the proceedings herein, the undersigned will move this Honorable Court at a Special Term, Part I, thereof, to be held in and for the County of New York at the County Court House located at Pearl and Centre Streets, Borough of Manhattan, City and State of New York, on the 22nd day of June, 1960, at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order directing that arbitration proceed, in the manner provided for in the arbitration agreement between the parties contained in the collective bargaining agreement between the parties, a copy of which is set forth in the petition annexed hereto, of the unsettled grievances known as National Appeal Grievances No. 2547-C; No. 2079-A; No. 2286-G and No. 1971-C; to interpret and apply the provisions of the National Agreement in connection with said unsettled grievances, and that the said order shall further provide that within ten days of the [fol. 9] service of a copy of said order with notice of entry thereof, the parties shall proceed with the selection of an arbitrator and with arbitration in accordance with the Voluntary Arbitration Rules of the American Arbitration Association, except insofar as said Rules have been modified by the collective bargaining agreement, and for such other and further relief as to this Court shall seem just and proper in the premises.

Dated: New York, N. Y., June 8th, 1960.

Yours, etc.

Lieberman, Katz & Aronson, Attorneys for Petitioner.

Benjamin C. Sigal, Esq., 1126 Sixteenth Street, N.W., Washington, D. C.

To:

Westinghouse Electric Corporation, Respondent, 40 Wall Street, New York, N. Y.

[fol. 10]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

PETITION OF JAMES B. CAREY, READ IN SUPPORT OF MOTION

To the Supreme Court of the State of New York, New York County:

The petition of James B. Carey, as President of International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O., hereinafter referred to as "Union", respectfully shows:

1. Your petitioner is the President of the Union, which is an unincorporated labor organization consisting of many thousands of members, organized into duly chartered Locals in many states of the United States. The headquarters of the Union are located at 1126 16th Street, N. W., Washington, D. C.

2. Westinghouse Electric Corporation, respondent herein, hereinafter referred to as "Company", is a Pennsylvania corporation engaged in the manufacture of electrical products and appliances at its many plants located in many states of the United States, including New York, New Jersey, Pennsylvania, Ohio and Maryland. The Company maintains executive offices at 40 Wall Street, New York, New York, and at 3 Gateway Center, Pittsburgh, Pennsylvania.

[fol. 11] 3. The Union is collective bargaining agency for the employees of the Company at a number of its plants, including its plants in New York, New Jersey, Ohio, Pennsylvania and Maryland. On or about March 20, 1956, the Union entered into a collective bargaining agreement, hereinafter called "National Agreement", with the Company which runs until October 15, 1960. The National Agreement sets forth provisions governing wages, hours and conditions of employment of the employees at various plants of the Company, including the plants located in Metuchin, New Jersey, East Pittsburgh, Pennsylvania,

Baltimore, Maryland, and Mansfield, Ohio. A true and correct copy of the National Agreement as modified will be handed up to the Court on the argument.

4. Said National Agreement contains the following section relating to arbitration, as follows:

"SECTION XIV-A ARBITRATION

"A. Except as otherwise provided in this Agreement, any grievance involving action taken or failure to act subsequent to the effective date of Supplement VII to this Agreement which remains unsettled after the grievance procedure has been exhausted pursuant to Section XIV and which involves either

"(1) The interpretation, application or claimed violation of a provision of this Agreement or of a [fol. 12] local supplement in effect in the bargaining unit in which the grievance arose, or

"(2) a disciplinary penalty, release or discharge which is alleged to have been imposed without just cause,

shall be submitted to arbitration upon the written request of either the Union or the Company. Such request shall be made within thirty (30) days after the Company receives notice that its final reply at the national appeal level is unsatisfactory. If no request for arbitration is made by either the Company or the Union during such thirty (30) days period, both parties shall be deemed to have waived to have waived [sic] their right to make such request. For the purpose of proceedings within the scope of (2) above, the standard to be applied by an arbitrator to cases involving disciplinary penalties, releases or discharges is that they shall be imposed only for just cause.

"B. (1) Within fifteen (15) days after receipt of a request for arbitration by the Company or the Union, representatives of the parties shall attempt to reach mutual agreement on the arbitrator. If the parties

fail to reach such mutual agreement on the arbitrator within the 15-day period, either party may, within [fol. 13] ten (10) days thereafter, request the American Arbitration Association to submit a list of names from the Association's Panels, from which an arbitrator may be chosen.

"(2) The parties shall also attempt to reach agreement on the question to be arbitrated. If agreement is reached, either party may withdraw from the agreement at any time thereafter until the hearing is closed if it believes the statement does not properly cover the matters at issue. Such withdrawal shall not prejudice the withdrawing party in any respect.

"C. In the selection of an arbitrator and the conduct of any arbitration proceeding, the Voluntary Labor Arbitration Rules of the American Arbitration Association, as amended and in effect March 1, 1952, (and which have remained in effect until the effective date of this Section) shall control, except that:

"(1) No arbitrator shall be appointed by the Association who has not been approved by both parties unless and until the parties have had submitted to them three lists of arbitrators from the Association's Panels, and have been unable to select a mutually satisfactory arbitrator therefrom;

[fol. 14] "(2) Either party may be represented by counsel at any hearing without prior notification to the other party or to the Association;

"(3) No modification of such Rules of the Association shall be controlling in any arbitration proceeding under this Agreement without mutual agreement in writing by the Company and the Union, except that both parties will comply with modifications to the extent that they involve the amount of the administrative fees of the Association;

"(4) The arbitrator shall have no authority to issue any subpoena or other form of legal process or award to compel either party to produce new evi-

dence (not already presented during processing of the grievance in the grievance procedure) considered by such party to be confidential or not relevant or material to the proceeding, or which is not available. This shall not limit the arbitrator's authority to compel the production of information which this Agreement or a local supplement requires either party to provide the other;

"(5) The American Arbitration Association shall have no authority to process a request for arbitration or appoint an arbitrator if either party shall [fol: 15] advise the Association that the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue. In such event, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with this Agreement and the above-mentioned Rules only after a final judgment of a Court has determined that the grievance upon which the arbitration has been requested raises an arbitrable issue or issues. The foregoing part of this Paragraph 5 shall not be applicable if by its terms the request for arbitration requests only relief from a disciplinary penalty, release or discharge alleged to have been imposed without just cause.

"D. Notwithstanding any other provision of this Agreement, no arbitrator shall, without specific written agreement of the Company and the Union with respect to the arbitration proceeding before him, be authorized to:

"(1) Add to, detract from or in any way alter the provisions of this Agreement, or any Supplement or local supplement to this Agreement;

"(2) Establish or modify any wage or salary rate, job classification or classification of any employe ex- [fol. 16] cept as provided in Section VIII, Paragraphs 9.D., and 9.E., or any time value under the incentive system;

"(3) Make any award with respect to the release of any new employe during his or her probationary period;

"(4) Make any award involving any matter relating to any pension and/or insurance agreement between the parties, any pension or insurance plan referred to or made a part of any such agreement, or the establishment, change, interpretation, application or administration of any pension or insurance plan;

"(5) Make any award requiring payment of any employe for any period more than thirty (30) days preceding the filing of the grievance.

"E. If the arbitration proceeding concerns a seniority grievance from a plant in which there is no local supplement on seniority at the time the action in question was taken, the arbitrator shall consider the provisions of this agreement together with the seniority practices existent in the bargaining unit at the time the action in question was taken which are not in conflict with this Agreement.

"F. The award of an arbitrator shall be in writing and shall be final and binding upon the parties to this [fol. 17] Agreement, the employe or employes involved in the grievance, and the Local representing the bargaining unit in which the grievance arose.

"G. The following procedures (not covered by the Rules of the American Arbitration Association referred to in Paragraph C of this Section) are hereby agreed upon as follows:

"(1) A copy of any document furnished to the arbitrator by either party shall also be furnished simultaneously to the other party. If no copy of a document furnished at the hearing is available, a copy will be prepared and furnished to the other party as soon as practicable.

"(2) In the event the arbitrator requests the parties to supply him with a stenographic record of the

arbitration proceeding the parties shall equally divide the cost of one copy for him.

"(3) Unless otherwise agreed upon, an arbitration proceeding hereunder shall include only grievances arising from the same plant or identical grievances arising from two or more plants. When an arbitration proceeding includes several grievances arising from the same plant, any identical grievances arising from another plant or plants may also be included."

[fol. 18] 5. After the making of the National Agreement, certain grievances, hereinafter more fully described, arose and were processed by the parties pursuant to the grievance procedure set forth in the collective bargaining agreement. The grievances were not settled, and the Union demanded arbitration with respect to each of them, which demand for arbitration the Company refused on the ground that each grievance, in its opinion, was not arbitrable. Said grievances were marked and known to parties as:

"National Appeal Grievance No. 2547-C" (Local 401, Metuchen, New Jersey)

"National Appeal Grievance No. 2079-A" (Local 601, East Pittsburgh, Pennsylvania)

"National Appeal Grievance No. 2286-G" (Local 130, Baltimore, Maryland)

"National Appeal Grievance No. 1971-C" (Local 711, Mansfield, Ohio)

* * * * * * *

[fol. 24] *National Appeal Grievance 2286-G* (Local 130, Baltimore, Maryland)

17. On or about March 5, 1958, the Union presented a grievance to the Company protesting the refusal of the Company to apply the National Agreement and the related Supplement to its production and maintenance employees at its Baltimore, Maryland, plant engaged in the manufacture of induction heating products, which work consists of assembly, wiring, power brake, machining and related operations in the tool crib and store room at the Company's

plant at 2579 Wilkins Avenue, Baltimore, Maryland. The Union contends that the work involved is production and maintenance work.

[fol. 25] Section I, Paragraph 1., of the National Agreement provides:

> "1. The Company agrees to recognize the Union, on behalf of and in conjunction with its Locals, for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. The units and Locals referred to in the preceding sentence are set forth in the Appendix attached hereto and made a part of this agreement." (Pages 1 and 2 of the National Agreement)

The Appendix to the National Agreement (page 90 of the National Agreement) provides as follows:

> "APPENDIX
>
> "UNITS FOR WHICH THE UNION OR ITS LOCALS HAVE BEEN CERTIFIED ON THE DATE OF THIS AGREEMENT. AS USED HEREIN, THE TERM "UNION" MEANS THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O. AND THE TERM "LOCAL" MEANS A LOCAL OF THE UNION.
>
> [fol. 26] "ITEM 1
>
> "UNIT: All production and maintenance employees of the Employer at its Baltimore Works located at 2519 Wilkens Avenue and 3601 Washington Boulevard, Baltimore, Maryland, including group leaders, and shop clerical employees, but excluding all salaried technical, office and office clerical employees, salaried time study clerks, clerical employees in the production planning department, guards, professional employees, and supervisors as defined in the Act."

18. The grievance was processed through all steps of the grievance procedure as provided in Section XIV of the National Agreement. On or about August 19, 1958, the Company notified the Union of its final decision denying the grievance.

19. The unsettled grievance involves the interpretation of Section I; Section VI-A, subsection (b); Section XII; and Item 2 of the National Agreement. On or about September 4, 1958, the Union notified the Company of its dissatisfaction with the Company's answer to the grievance and the Union's desire to process the issue to arbitration. On or about September 15, 1958, the Company acted through its duly authorized representative, R. G. Pumphrey, Arbitration Representative, Labor Relations, and notified the Union that the Company did not believe the [fol. 27] question was subject to arbitration under the National Agreement. A true and correct copy of this letter is attached hereto, marked Exhibit 5, and made a part hereof.

20. On or about September 17, 1958, the Union requested the Arbitration Association to process the grievance in arbitration. On or about September 22, 1958, the Company sent a letter to the Association advising it that the Company did not believe the issue should be arbitrated. A true and correct copy of the Company's letter is attached hereto, marked Exhibit 6, and made a part hereof. By virtue of the fact it had sent such notice to the Association, the Company prevented the said Association from proceeding to process the Union's request for arbitration. The Association so notified the Union to that effect by letter dated September 26, 1958. A true and correct copy of this notice is attached hereto, marked Exhibit 7, and made a part hereof.

21. Petitioner alleges that this grievance involves interpretation and application of contractual provisions which require the Company to recognize the Union as the collective bargaining agent of all employees doing bargaining unit work, and that the National Agreement must be applied to all employees performing bargaining unit work.

• • • • • • •

[fol. 30] 27. Petitioner has been advised by counsel, and therefore avers, that in cases such as these the Court does not consider the merits of the controversy or dispute between the parties, but merely determines whether or not a bona fide dispute exists which should be resolved by the arbitrator in accordance with the National Agreement. Your petitioner, therefore, does not request the Court to decide which interpretations of the agreement are the correct ones, but does respectfully request the Court to decide that the issues involved in the foregoing grievances are arbitrable, and that the issues of interpretation, application and claimed violations of the agreement should be resolved by the arbitrator.

28. The issues in these grievances are of the utmost importance to thousands of employees in the many plants of the Company throughout the nation and are of great concern to them. There is great need that these disputes be resolved by arbitration so that industrial self-government may proceed in orderly fashion through arbitration according to the National Agreement.

[fol. 31] 29. With respect to each of the foregoing unsettled grievances, the Respondent has prevented arbitration by notifying the American Arbitration Association that, in its opinion, the grievance does not raise an arbitrable issue. Under the terms of the arbitration agreement, the American Arbitration Association has no authority to process the requests for arbitration unless this Court shall determine that the grievances raise an arbitrable issue or issues. Petitioner alleges that each grievance is arbitrable under the terms of the agreement since each grievance involves the interpretation, application or claimed violation of the National Agreement or of the Local Supplement.

30. No previous application has been made for the order or relief sought herein.

Wherefore, your Petitioner prays for an order directing that arbitration proceed in the manner provided for in the arbitration agreement in connection with the grievances known as National Appeal Grievances Nos. 2547-C; 2079-A; 2286-G; 1971-C; to interpret and apply the several provi-

sions of the collective bargaining agreement to said gri
ances; that said order further provide that the part
shall proceed to arbitration in the manner set forth in
arbitration agreement within ten (10) days of the serv
of a copy of the said order with notice of entry there
and for such other and further relief as to this Court sh
seem just and proper.

(Verified by James B. Carey on June 6, 1960.)

[fol. 40]

EXHIBIT 5 TO PETITION OF JAMES B. CAREY

WESTINGHOUSE
ELECTRIC CORPORATION
3 GATEWAY CENTER
P. O. BOX 2278
PITTSBURGH 30, PA.

September 15, 1958

Mr. Robert Nellis, Chairman
Westinghouse Conference Board
IUE—AFL-CIO
208 Shields Building
822 Wood Street
Pittsburgh 21, Pennsylvania

re: Appeal Grievance 2286-G
Local Grievance 1055
Local 130—Baltimore, Maryland

Dear Sir:

Reference is made to your letter dated September 4, 1958
in which you request that the above-identified grievance be
processed into arbitration. It is noted that this grievance
is a complaint from your Union alleging that certain em-
ployes in the Engineering Laboratory of the Industrial
Electronics Department should be represented by the IUE
rather than their present bargaining agent. This is a rep-
resentation matter which normally is aired before the Labor
Board. Obviously, it is not a matter contemplated by the

[fol. 41] arbitration provisions of our National Agreement and the Company is unable to comply with your request in this regard.

Yours truly,

R. G. Pumphrey
Arbitration Representative
Labor Relations

ep
cc: Mr. Ellis Hockenberry

[fol. 42]

EXHIBIT 6 TO PETITION OF JAMES B. CAREY

WESTINGHOUSE
ELECTRIC CORPORATION
3 GATEWAY CENTER
P. O. BOX 2278
PITTSBURGH 30, PA.

September 22, 1958

Mr. Herbert Schmertz
Regional Manager
American Arbitration Association
477 Madison Avenue
New York 22, N. Y.

Re: IUE—AFL-CIO, Local 130

—and—

Westinghouse Electric Corporation
Appeal Grievance No. 2286-G

Dear Sir:

Reference is made to a letter dated September 17, 1958, addressed to you by Mr. Ellis Hockenberry, of the IUE, in which he requested that the above identified grievance be processed into arbitration. A copy of this letter was sent to me and it indicates that the Union has furnished you with a copy of my letter dated September 15, 1958, in which the Union was told that in the opinion of the Company this

grievance does not raise an arbitrable issue under the future disputes clause of the labor agreement.

[fol. 43] In view of the above, the Company directs your attention to Paragraph C-5, Section XIV-A (Arbitration) of the Agreement existing between the parties whereby the Association is estopped from processing this arbitration request until after a final judgment of a court has determined that the grievance upon which the arbitration has been requested raises an arbitrable issue.

Yours truly,

R. G. Pumphrey
Arbitration Representative
Labor Relations

ep
cc: Mr. Ellis Hockenberry

[fol. 44]

EXHIBIT 7 TO PETITION OF JAMES B. CAREY

AMERICAN ARBITRATION ASSOCIATION
477 MADISON AVENUE, NEW YORK 22, N. Y.
Telephone Plaza 9-7900

In re:

IUE, AFL-CIO, Local 130

—and—

Westinghouse Electric Corporation
Re: National Appeal Grievance #2286-G

IUE, Radio & Machine Workers, AFL-CIO
Local 130
Attn: Mr. Ellis Hockenberry, Secretary
National Westinghouse Conference Board
208-11 Shields Building
822 Wood Street
Pittsburgh 21, Pa.

September 26, 1958

Westinghouse Electric Corporation
Attn: Mr. R. G. Pumphrey
Arbitration Representative, Labor Relations
3 Gateway Center
P.O. Box 2278
Pittsburgh 30, Pa.

Gentlemen:

This will acknowledge receipt of a letter dated September 17, 1958 with enclosures from Mr. Ellis Hockenberry, Sec- [fol. 45] retary of the Union, in which he informs us of their desire to process the above grievance to arbitration. Accompanied with this is a copy of a letter to the Union from the Company indicating their refusal to arbitrate this dispute.

This will acknowledge receipt of a letter dated September 22, 1958 from Mr. R. G. Pumphrey, Arbitration Representative of the Company, in which he informs us that in the Company's view the above grievance does not raise an arbitrable issue.

Therefore, in accordance with the above and Section XIV, A, C(5) of the Contract between the parties, we will not proceed until the issue of arbitrability is determined by an appropriate court or arbitration is directed in accordance with the provisions of said section.

Very truly yours,

Herbert Schmertz
Tribunal Clerk

HS:ge.

[fol. 53]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ANSWER TO PETITION—October 10, 1960

Respondent, for its answer to the Petition herein, on information and belief:

1. Denies each and every allegation of the first and third sentences of paragraph 3 except that (i) Petitioner is the collective bargaining agency for certain of the employees of Respondent at a number of its plants, including its plants in New York, New Jersey, Ohio, Pennsylvania and Maryland and (ii) the National Agreement between Petitioner and Respondent sets forth provisions governing wages, hours and conditions of employment of certain of the employees at various plants of Respondent, including the plants located in Metuchen, New Jersey, East Pittsburgh, Pennsylvania, Baltimore, Maryland, and Mansfield, Ohio.

* * * * * * *

[fol. 54] 6. Denies each and every allegation of the first sentence of paragraph 17 except that on or about March 5, 1958, the Union presented a grievance to the Company claiming that Engineering Laboratory employees of the Company at its plant at 2579 Wilkins Avenue, Baltimore, Maryland, who were performing assembly, wiring, power [fol. 55] brake and machining operations and attending to the Engineering Laboratory tool crib and storeroom should be in the bargaining unit represented by Local 1305 Union.

7. Denies each and every allegation of the first sentence of paragraph 19.

8. With respect to the allegations of paragraph 21, denies that National Appeal Grievance No. 2286-G (Local 130, Baltimore, Maryland) involves interpretation and application of contractual provisions which require Respondent to recognize Petitioner as the collective bargaining agent of all employees doing bargaining unit work and that the

National Agreement must be applied to all employees performing bargaining unit work.

• • • • • • •

[fol. 56] 11. Denies each and every allegation of paragraph 28.

12. Denies the allegations of the third sentence of paragraph 29.

Respondent, for an affirmative defense to the Petition in so far as it seeks to compel Respondent to submit National Appeal Grievance No. 1971-C (Local 711, Mansfield, Ohio) to arbitration:

• • • • • • • •

Respondent, for an affirmative defense to the Petition in so far as it seeks to compel Respondent to submit [fol. 57] National Appeal Grievance No. 2286-G (Local 130, Baltimore, Maryland):

15. Alleges that the industrial operations from which said Grievance arose affect commerce and that the National Labor Relations Board has exclusive jurisdiction over the subject matter of said Grievance.

Wherefore, Respondent demands that an order be entered dismissing the Petition in all respects and directing Petitioner to pay Respondent its costs and disbursements in this proceeding.

Cravath, Swaine & Moore, Attorneys for Respondent.

Dated: October 10, 1960.

(Verified by Albert R. Connelly on October 10, 1961.)

[fol. 58]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF CLARK C. FRAME, READ IN OPPOSITION TO MOTION

State of Pennsylvania,
County of Allegheny, ss.:

Clark C. Frame, being duly sworn, deposes and says:

1. I am Director of Labor Relations for Westinghouse Electric Corporation (hereinafter called the Company). This affidavit is submitted in opposition to the petition of James B. Carey (hereinafter called the Petition), as President of International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O. (hereinafter called the Union). The Petition refers to four disputes between the Union and the Company arising at various of the Company's plants and processed through the grievance procedures provided for by Section XIV ("Settlement of Disputes") of the collective bargaining agreement between the Company and the Union entered into on October 1, 1950, as modified by Supplements I through VIII, executed at various times between October 1, 1950 and October 31, 1957 (hereinafter called the National Agreement).

[fol. 59] 2. The National Agreement, both before and after Supplement VII executed March 20, 1956, provided certain machinery for the resolution of disputes between the Company and the Union as set forth in Section XIV. That Section provides that the Union may institute a "grievance" with respect to any "problem concerning rates of pay, wages, hours of employment, or any other condition of employment . . . " (p. 37 of the National Agreement). Grievance procedures begin at the level of conferences between the shop steward and foreman involved and may be processed through successive echelons of the Union and the Company to the so-called National Appeal level. As noted, the permissible subject matter of a grievance (any *problem*) is extremely broad. Section VI ("Strikes, Stoppages

and Lockouts") of the National Agreement provides (in Subsection A) that the Union will not cause or officially sanction any strike on the part of the employes with respect to a dispute which is subject to the grievance procedures of Section XIV until those procedures have been exhausted.

3. On March 20, 1956, Section XIV-A, containing a limited consent by the Company to arbitration of certain types of unsettled grievances, was added to the National Agreement. Out of the broad possible subject matters of grievances cognizable under Section XIV, Section XIV-A provides an advance consent to arbitration of grievances involving either

> [fol. 60] "(1) The interpretation, application or claimed violation of a provision of this Agreement or of a local supplement in effect in the bargaining unit in which the grievance arose, or
>
> "(2) a disciplinary penalty, release or discharge which is alleged to have been imposed without just cause, . . ." (XIV-A.A).

Even this limited consent of the Company to arbitration is qualified as follows:

> "D. Notwithstanding any other provisions of this Agreement, no arbitrator shall, without specific written agreement of the Company and the Union with respect to the arbitration proceeding before him, be authorized to:
>
> "(1) Add to, detract from, or in any way alter the provisions of this Agreement or any Supplement or local supplement to this Agreement;
>
> "(2) Establish or modify any wage or salary rate, job classification or classification of any employe except as provided in Section VIII, Paragraphs 9.D. and 9.E., or any time value under the incentive system;
>
> "(3) Make any award with respect to the release of any new employe during his or her probationary period;

[fol. 61] "(4) Make any award involving any matter relating to any pension and/or insurance agreement between the parties, any pension or insurance plan referred to or made a part of any such agreement, or the establishment, change, interpretation, application or administration of any pension or insurance plan;

"(5) Make any award requiring payment to any employe for any period more than thirty (30) days preceding the filing of the grievance." (XIV-A.D)

If the Company and the Union mutually desire to submit a particular grievance (whether or not arbitrable under Section XIV-A) to an arbitrator, machinery for such jointly consented to arbitration is provided by Section XIV.B4.

4. Upon the addition to the National Agreement of the Company's limited advance consent to arbitration, Section VI of that Agreement was also modified (by the addition of subsection B) to enlarge slightly the Union's limited "no strike" obligation to include an obligation not to strike with respect to such unsettled grievances as are subject to arbitration under the new Section XIV-A. Section VI B also provides that, should the Company question the arbitrability of any grievance under Section XIV-A, the Union shall retain its full rights to strike in support of the [fol. 62] grievance (subject to certain notice provisions not material here). Thus, the obligation of the Company to submit to arbitration and the obligation of the Union not to strike are co-extensive and, in this respect, the National Agreement differs from that type of collective bargaining agreement in which a union has unconditionally obligated itself not to strike in exchange for an obligation of a company to submit unresolved disputes of a certain nature to arbitration. Under the National Agreement, when the Company questions the arbitrability of a grievance, the Union is freed of its "no strike" obligation whether or not it should later be determined that the grievance is arbitrable.

5. I am advised, and therefore aver, that there is no provision of either Federal or state law which provides for the compulsory arbitration of disputes between the Company and the Union and that the Company cannot be compelled to submit to an arbitrator any dispute between it and the Union unless it has consented to do so. By plain language and clear intendment, the Company has limited its consent to arbitrate grievances to those types of grievances described in Section XIV-A of the National Agreement and subject to the provisos contained in that Section. The Company has not consented to the arbitration of any grievance involving:

(i) a request by the Union for the alteration of any provision of the National Agreement (such as National [fol. 63] Appeal Grievance No. 2574-C arising from the Company's Metuchen, New Jersey plant and more fully described in the affidavit of G. M. Nicholson submitted herewith);

(ii) a request by the Union for the modification of a time value under the Company's incentive pay system (such as National Appeal Grievance No. 2079-A arising from the Company's East Pittsburgh, Pennsylvania plant and more fully described in the affidavit of W. W. Heimbach submitted herewith);

(iii) a request by the Union for the resolution of a dispute which is within the exclusive jurisdiction of the National Labor Relations Board (such as National Appeal Grievance No. 2286-G arising from the Company's Baltimore, Maryland plant and more fully described in the affidavit of K. H. Smith submitted herewith);

(iv) except with respect to the observance of accumulated seniority of former employes when increasing the work force, a challenge by the Union to any action or inaction of the Company with respect to employing or re-employing any person (such as National Appeal Grievance No. 1971-C arising from the Company's Mansfield, Ohio plant and more fully described in the affidavit of G. M. Nicholson submitted herewith).

[fol. 64] 6. It is respectfully submitted that, on the basis of the foregoing and of the affidavits of G. M. Nicholson, W. W. Heimbach and K. H. Smith submitted herewith, the Petition should be dismissed in all respects.

(Sworn to by Clark C. Frame on July 7, 1960.)

[fol. 65]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF K. H. SMITH, READ IN OPPOSITION TO MOTION —June 29, 1960

State of New York,
County of New York, ss.:

K. H. SMITH, being duly sworn, deposes and says:

1. I am an Assistant Director of Labor Relations for Westinghouse Electric Corporation (hereinafter called the Company) and my duties include responsibility for union relations in the Company's General Products Group, which Group includes the Company's X-Ray and Industrial Electronics Equipment operations in Baltimore, Maryland. As part of my duties, I have investigated the grievance referred to in the petition of James B. Carey (hereinafter called the Petition), as President of International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O. (hereinafter called the Union), which arose in the Company's Wilkens Avenue plant in Baltimore, *viz.*, National Appeal Grievance No. 2286-G (Local 130, Baltimore, Maryland) (hereinafter called the Certification Grievance). This [fol. 66] affidavit is submitted in opposition to the Petition in so far as it seeks an order to compel the Company to proceed to arbitration of the Certification Grievance.

2. Since long prior to 1955, the Company has conducted X-ray and industrial electronics operations at its plant at Wilkens Avenue, Baltimore. Such operations include, in addition to the *production* of X-ray and industrial electronics equipment, an engineering laboratory in which ex-

perimental and pilot equipment is developed, models of such equipment are constructed and certain pieces of equipment are individually built to the particular specifications of customers. Naturally, such construction requires the work of expert machinists, power brake operators, etc.—salaried technical employes who perform types of jobs which also occur in production operations. Pursuant to determinations of the National Labor Relations Board (hereinafter called NLRB), with respect to appropriate employe units for collective bargaining purposes at the Wilkens Avenue plant.

(i) all employes whose work was *for the purpose of producing* X-ray and industrial electronics equipment or for the purpose of plant and equipment maintenance (unless they were salaried technical, office and office-clerical employes, salaried time study clerks, clerical employes in the production planning department, guards, professional employes and supervisors) were [fol. 67] grouped into one unit for purposes of collective bargaining with the Company (hereinafter called the Production and Maintenance Unit); and

(ii) all salaried technical, clerical and professional employes whose work was *not for the purpose of production* and maintenance (plus other categories of employes not relevant here) were grouped into another unit for purposes of collective bargaining with the Company (hereinafter called the Salaried Unit).

3. Thereafter, pursuant to Federal law and under the supervision of NLRB, separate elections were held among employes in the Production and Maintenance Unit and in the Salaried Unit in order that the members of each such group of employes might exercise their rights under Federal law freely to choose the labor organization which they wished to represent them for purposes of collective bargaining with the Company. As a result of such elections, employes in the Production and Maintenance Unit (mostly hourly-paid) chose a labor organization predecessor to the Union as their collective bargaining representative and employes in the Salaried Unit chose the Association of West-

inghouse Salaried Employes, X-Ray and Industrial Electronics Division, an affiliate of the Federation of Westinghouse Industrial Salaried Unions (hereinafter called the Federation), as their bargaining representative.

[fol. 68] 4. Subsequently, the Company, temporarily requiring an addition to its floor space at Wilkens Avenue, took floor space at a location on Eagle Street in Baltimore, a few blocks away. To that Eagle Street annex were transferred certain production and maintenance operations and the Engineering Laboratory. The labor organization predecessor to the Union continued to represent those production and maintenance employees who were assigned to work at the Eagle Street annex and the Federation continued to represent the Engineering Laboratory employes after the temporary relocation of the Engineering Laboratory at that annex.

5. In 1955, the Union, seeking status as a collective bargaining representative of employes of the Company at its Wilkens Avenue plant and its Eagle Street annex, petitioned NLRB for a determination of an appropriate unit of employes for purposes of collective bargaining representation and the Board once again determined that all production and maintenance employes (except salaried technical, office and office-clerical, salaried time study clerks, clerical employes in the production planning department, guards, professional employes and supervisors) constituted an appropriate unit for purposes of collective bargaining with the Company. Following that NLRB reaffirmance of the Production and Maintenance Unit, an election was held in which employes in that Unit determined that the [fol. 69] Union was the labor organization which they wished to represent them for purposes of collective bargaining with the Company. As a preliminary to that election, election notices were published which described the employes eligible to vote in the election and that description did not include the Engineering Laboratory employes then at the Eagle Street annex and now the subject of the Certification Grievance. The Union did not protest the description contained in the election notice and, needless to say, the Engineering Laboratory employes did not vote

in the election. Thus, the only collective bargaining representative which the Engineering Laboratory employes have ever chosen to represent them in dealings with the Company is the Federation.

6. Following the 1955 election and prior to the institution by the Union of the Certification Grievance, the Company's floor space problems at Wilkens Avenue were alleviated and the operations which had temporarily been located at the Eagle Street annex were returned to Wilkens Avenue. Thereafter, the Union continued to represent all employes in the Production and Maintenance Unit (including those who had been temporarily transferred to Eagle Street) and the Federation continued to represent employes in the Salaried Unit including the Engineering Laboratory employes.

7. On March 5, 1958, the Union instituted a grievance claiming that those employes in the Engineering Laboratory [fol. 70] who were performing assembly, wiring, power brake and machining operations and attending the tool crib and the supply room should be in the Production and Maintenance Unit. Those employes were and are in the Salaried Unit, most of them are dues-paying members of the Federation and none of them has had an opportunity to vote in a Production and Maintenance Unit election as to whether he wishes the Union to be his collective bargaining representative. The Union's grievance was filed under the provisions of Section XIV of the collective bargaining agreement between the Company and the Union, effective October 1, 1950, as modified by Supplements I-VIII (hereinafter called the National Agreement), which permits the filing of a grievance with respect to any "problem concerning . . . conditions of employment." At no point in the various grievance steps provided by Section XIV did the Union claim that the grievance involved the "interpretation, application or claimed violation of a provision of" the National Agreement. At all steps in those grievance procedures, the Company pointed out to the Union that it was raising an issue as to the appropriate unit for collective bargaining purposes—an issue over which the jurisdiction of NLRB was exclusive and plenary. On September 17, 1958, the

Company having finally rejected the Certification Grievance, the Union requested that it be submitted to arbitration (although even that request did not assert that the [fol. 71] Certification Grievance involved the interpretation, application or claimed violation of the National Agreement, nor did it refer to any provision of the National Agreement which it claimed had been violated or which required interpretation or application). The Company, having advised the Union that the Certification Grievance was not arbitrable under Section XIV-A of the National Agreement (but "a representation matter which normally is aired before the Labor Board"), the American Arbitration Association, on September 26, 1958, declined to proceed with the arbitration requested by the Union. One year and eight months later, the Union brought the instant Petition, seeking an order of the Court compelling the Company to submit the Certification Grievance to arbitration.

8. The Federation has a collective bargaining agreement with the Company, effective November 1, 1950, as modified by Supplements I-XIII, which contains the following provisions, among others:

(i) By Section I the "Company recognizes the Federation . . . for those units where the Federation . . . through a National Labor Relations Board certification has been lawfully designated as the exclusive bargaining agent. The units for which the Federation [has] . . . been certified and which are included within this Agreement are set forth in the Appendix attached hereto and made a part of this Agreement."

[fol. 72] (ii) The Appendix describes, in Item 2, as one of the units "for which the Federation [has] been certified and which are covered by this Agreement"—"All salaried, technical, office and office clerical employees of Westinghouse Electric Corporation (Industrial Electronics and X-Ray Div.), Baltimore, Md. . . . but excluding . . . all production and maintenance . . . employees".

(iii) Section XV-A ("Arbitration") provides the advance consent of the Company to arbitration and arbi-

tration procedures identical in all material respects with the provisions of Section XIV-A of the National Agreement between the Company and the Union.

Thus, if the Company were to treat the employes who are the subject of the Certification Grievance as covered by the National Agreement, it is clear that the Federation could make out the same case for compulsory arbitration of a fully analogous claim of contractual violation as the Union has made out in its Petition. If the Union has the right to compel the Company to arbitrate the Certification Grievance, the Federation would have a right to compel the Company to arbitrate the contrary proposition. If the arbitrator now sought by the Union were to find that the Engineering Laboratory employes who are the subject of the Grievance should be in the Production and Maintenance Unit as defined by Item 1 of the National Agreement, the arbitrator in the Federation proceeding could enter an award to the effect that those employes should be in the Salaried Unit as defined in Item 2 of the collective bargaining agreement between the Company and the Federation. The Company then would be faced with two conflicting arbitration awards placing it on the horns of a dilemma with respect to a controversy between the Union and the Federation as to which the Company is, and by Federal law must be, completely neutral.

[fol. 73]

9. On information and belief, the Engineering Laboratory employes over which the Union seeks to gain control in the Certification Grievance do not wish to be represented by the Union and prefer to be represented by the Federation. Should the Court compel arbitration of the Certification Grievance and should the Union be successful in that arbitration, it is apparent that there would be serious industrial discord among the Engineering Laboratory employes at the Company's Wilkens Avenue plant. If the status quo with respect to Union representation at Wilkens Avenue (as previously determined by NLRB and the free ballots of the Company's employes there) were in "great need" of arbitration, as the Petition (p. 14) erroneously alleges, it is apparent that the Union would have

sought relief from NLRB, rather than waiting twenty [fol. 74] months between the Company's denial of arbitrability of the Certification Grievance and the filing of the Petition.

10. I am advised, and therefore aver, that, under Federal law, NLRB has exclusive jurisdiction over the dispute underlying the Certification Grievance, that the appropriate remedy of the Union with respect to that dispute is to petition NLRB for a redetermination of appropriate bargaining units at the Company's Wilkens Avenue plant and that, should this Grievance be forced into arbitration, the award of the arbitrator would be completely ineffective to alter the bargaining units determined by the NLRB or to be determined by that Federal agency at any time in the future.

11. The Company has not consented to the arbitration of the Certification Grievance because

(i) prior to the filing of the Petition, the Grievance was never asserted by the Union to involve the interpretation, application or claimed violation of the National Agreement (specified as a condition to the Company's consent to arbitration in Section XIV-A-A(1)); and

(ii) nowhere in Section XIV-A of the National Agreement has the Company consented to the arbitration of a dispute which is in the exclusive jurisdiction of the NLRB (and, I am advised and therefore aver, that, if such a consent had been given, it would have been completely ineffective to confer jurisdiction on the arbi- [fol. 75] trator or to confer jurisdiction on a court to compel arbitration).

12. It would be inequitable for the Court to compel arbitration of the Certification Grievance under the National Agreement because

(i) the underlying dispute is one between the Union and the Federation as which the Company is in the status of an innocent by-stander;

(ii) the party to the dispute genuinely adverse to the Union, the Federation, would not be a party to that arbitration;

(iii) the Federation could obtain arbitration of the same subject matter as a result of which the Company might be faced with two conflicting arbitration awards; and

(iv) the Union has no need for the relief it here seeks since it has been, is now and will continue to be free to present the subject matter of the Grievance to NLRB for adjudication.

13. I am advised and therefore aver that it would be illegal and contrary to Federal labor policy for the Court to compel arbitration of the Certification Grievance because

(i) the subject matter of the Grievance is within the exclusive jurisdiction of NLRB; and

(ii) compelling the Company to submit to arbitration of the Grievance would, rather than allaying in- [fol. 76] dustrial discord (nonexistent at this time), foment such discord among the Company's Engineering Laboratory employes.

14. It is respectfully submitted that the Petition in so far as it seeks an order compelling the Company to submit the Certification Grievance to an arbitrator, should be dismissed.

June 29, 1960.

(Sworn to by K. H. Smith on June 29, 1960.)

[fol. 93]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

REPLY AFFIDAVIT OF ELLIS HOCKENBERRY, READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

ELLIS HOCKENBERRY, being duly sworn, deposes and says:

I was an International vice-president of the International Union of Electrical, Radio and Machine Workers (A.F.L.-C.I.O.) at the time the grievances were initiated and processed, and I am also the Executive Secretary of the I.U.E.-Westinghouse Conference Board. Robert Nellis, the Chairman of the Conference Board, and I handle all grievances at Step 4 of the grievance procedure under Section XIV of the current collective bargaining agreement. Section XIV-A is the arbitration agreement which is involved in this case.

I am thoroughly familiar with the grievances which are the subject matter of this proceeding to compel the Company to proceed to arbitrate the grievances. I have read the affidavits of Clark C. Frame, dated July 7, 1960; G. M. [fol. 94] Nicholson, dated June 29, 1960; W. W. Heinbach [sic], dated July 8, 1960 and K. H. Smith, dated June 29, 1960.

I wish to make a brief and concise reply to those affidavits. I shall refrain from a full discussion of the Union's claims and contentions in each grievance because I have been informed by counsel that under the recent decisions of the Supreme Court of the United States in the *Steel Workers* cases, the law is firmly fixed that the Court will not enter into any consideration of the merits of the claims of the parties.

I wish to point out at the outset that, as set forth in the petition to compel arbitration submitted by our President, James B. Carey, each and every grievance involves a claim by the Union that the Company has violated one or several provisions of the collective bargaining agreement. In the

grievance which arose in Metuchen, New Jersey, No. 2547-C, the Union claims that the Company has violated Section XII E.1. of the collective bargaining agreement; in the grievance which arose in East Pittsburgh, No. 2079-A, the Union claims that the Company violated Section VIII 8.E.(2)C. of the collective bargaining agreement; in the grievance which arose in Baltimore, Maryland, No. 2286-G, the Union claims that the Company violated Section 1, Paragraph 1, of the National Agreement, the Appendix to the National Agreement, Section VI-A, subsection (b), Section XII and Item 2 of the National Agreement; and in [fol. 95] the grievance which arose in Mansfield, Ohio, No. 1971-C, the Union claims that the Company violated Section XIV-A, Subsection A (2). This being so, it is plain that all of the grievances are arbitrable since the arbitration clause makes arbitrable any unsettled grievance which involves a claimed violation of the provisions of the agreement, as well as the interpretation or application of the agreement, and, of course, makes arbitrable any discharge alleged to have been imposed without just cause.

Despite the clear mandate of the arbitration agreement, the Company persists in its refusal to abide by its agreement to arbitrate on various grounds which should be addressed to the arbitrator rather than to the Court. I respectfully urge the Court to make clear to Westinghouse that in its efforts to entangle the Court in a consideration of the merits of the grievances, it is doing a great disservice to the arbitral process, and by frustrating arbitration it is violating the provisions of Section XIV-A of the agreement.

The Company in its opposing affidavits, seeks to attach prejudicial labels to the various grievances.

* * * * * * *

[fol. 103] When we turn to the grievance which arose in Baltimore, Maryland, No. 2286-G, we find again an effort by the Company to obscure the issues involved by prejudicial terminology.

This grievance the Company refers to as "the certification grievance". Actually, it is nothing of the kind. It merely involves a violation by the Company of the rights

of the Union to represent the employees who perform production and maintenance work and to have the terms of the agreement apply to them.

I have no wish to burden this affidavit, already too long, with a full and complete recitation of the facts. I do say that the affidavit of K. H. Smith does not give the whole [fol. 104] story. Briefly, at the time of the election no production and maintenance work was performed at the Eagle Street plant. At that time the laboratory unit did no production and maintenance work. It was only after the election that the Company gradually moved production and maintenance work to the Eagle Street plant. More than 50% of the production and maintenance workers who had voted in the election as part of the production and maintenance unit, were moved by the Company into the laboratory unit for the purpose of doing production and maintenance work.

Thereafter, the Company moved out of the Eagle Street plant and back to the Wilkens Street Plant. The laboratory unit in the Wilkens Street plant is located on the same floor where production and maintenance workers are employed. The production and maintenance employees who work in the laboratory unit do the same kind of work as is done by the other production and maintenance employees on the same floor; they work on the same machinery, do the same work and there is no physical separation between them. The only difference is that the Company, by moving these production and maintenance workers out of our unit of production and maintenance workers, now seeks to deprive those workers of the benefits of the contract. The simple question in this case is whether the Company can thus destroy the Union contract. The Union believes the Company has violated the agreement in so doing.

[fol. 105] The Company seeks to argue to the Court that only the National Labor Relations Board has jurisdiction to determine whether it has violated its contract. This is a repetition of a similar effort made by the Company to resist arbitration on the ground that a contract violation in another case was at the same time an unfair labor practice. It argued from this that therefore only the National

Labor Relations Board had jurisdiction and the arbitrator had no authority to decide the question. The Court of Appeals in *Carey* v. *Westinghouse Electrical Corp.*, 180 NYS 2d 203, 205; 6 N. Y. 2d 934, aff'd without opinion; 190 NYS 2d 1003, following decisions by the United States Supreme Court and Courts of Appeal, rejected that argument and held that the matter was arbitrable. The similar argument made in connection with this grievance should also be rejected.

I respectfully submit that all of the grievances are arbitrable since they involve claimed violations of the agreement and also the interpretation and application of various provisions of the agreement. As Mr. Justice Douglas said in *Steel Workers* v. *American Manufacturing Co.*,—U. S.—, 46 L. R. R. M. 2414:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the [fol. 106] contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> "The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware."

Again, in *Steel Workers* v. *Warrior Navigation Co.*,—U. S.—, 42 L. R. R. M. 2416, at 2419, Mr. Justice Douglas said:

"An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

• • • • • • • •

[fol. 107] "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."

In his concurring opinion to the three arbitration cases decided by the Supreme Court, and which appears at the end of the opinion in *Steel Workers* v. *Enterprise Wheel and Car Corp.*,—U. S.—, 46 L. R. R. M. 2423, at 2427, Mr. Justice Brennan said:

"And I emphasize this, for the arbitration promise is itself a contract. . . . It is particularly underscored that the arbitral process in collective bargaining presupposes that the parties wanted the informed judgment of an arbitrator, precisely for the reason that judges cannot provide it."

• • • • • • • •

"I do not understand the Court to mean that the application of the principles announced today depends upon the presence of a no-strike clause in the agreement."

[fol. 108] I, therefore, respectfully pray that the Court grant an order directing the Company to proceed with arbitration of all of the grievances set forth in the petition.

(Sworn to by Ellis Hockenberry on September 23, 1960.)

[fol. 111]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SUR-REPLY AFFIDAVIT OF K. H. SMITH, READ IN OPPOSITION TO MOTION

State of Pennsylvania,
County of Allegheny, ss.:

K. H. SMITH, being duly sworn, deposes and says:

This affidavit is submitted in reply to the affidavit of Ellis Hockenberry, dated September 23, 1960, in so far as that affidavit pertains to National Appeal Grievance No. 2286-G (Local 130, Baltimore, Maryland) (the Certificate in Grievance).

In my initial affidavit (p. 5), dated June 29, 1960, I pointed out that "At no point in the various grievance steps provided by Section XIV did the Union claim that the grievance involved the 'interpretation, application or claimed violation of provisions of' the National Agreement". The Hockenberry affidavit (p. 2) does not contradict that assertion but simply asserts that the Petition of James B. Carey which instituted this proceeding claims that this grievance involves the contention by the Union [fol. 112] that the Company violated various provisions of the National Agreement. There is no controversy but that the Union, in this proceeding to compel arbitration, is now introducing into the Certification Grievance a claim that it involves violations of the National Agreement. The point of my original affidavit, which I here reassert, is that the Union did not claim any contract violation at any time prior to the filing of the Petition. Attached to this affidavit as Exhibit A is a true photostatic copy of the original grievance (dated March 5, 1958), as contained in the files of the Company. Exhibit A clearly shows that the Certification Grievance was and is a claim that certain employees should be in the Production and Maintenance Unit. There is nothing in the subsequent grievance papers which claims a violation of the National Agreement.

The Hockenberry affidavit (p. 9) also claims that at the time of the 1955 Production and Maintenance Unit election "no production and maintenance work was performed at the Eagle Street plant". The point of my original affidavit (still unchallenged by the Union) is that the Engineering Laboratory employees whether located at Eagle Street or Wilkins Avenue (Engineering Laboratory operations were then in the process of being transferred to Eagle Street) did not vote in the Production and Maintenance Unit election. The Hockenberry affidavit (p. 9) also states that "More than 50% of the production and maintenance workers who had voted in the election as a part of the produc-
[fol. 113] tion and maintenance Unit, were moved by the Company into the laboratory unit for the purpose of doing production and maintenance work." That assertion is not only incorrect, it is patently incredible. The Production and Maintenance Unit contains and has always contained several hundred employees while the Engineering Laboratory contains approximately 20 employees; 50% of several hundred is so much greater than 20 that simple arithmetic demonstrates the error of the Hockenberry affidavit. While the Company does not have records which indicate the names of employees who voted in representation elections, the fact is that, at most, a handful of employees who were doing Production and Maintenance Unit work in 1955 (and who thus voted in the 1955 Production and Maintenance Unit elections) have been upgraded to salaried technical status in the Engineering Laboratory—but those few instances of upgrading do not alter the Unit determinations of the National Labor Relations Board or the Board's certifications of duly elected bargaining representatives The bulk of the Engineering Laboratory employees are members of the Federation and, as a group, they have always been represented by the Federation.

In August of 1960, because of certain problems which had arisen as to the inclusion of professional employees in the Salaried Unit represented by the Federation, the Company
[fol. 114] petitioned the Board to review and redetermine the appropriate composition of the Salaried Unit. Petitioner intervened in that proceeding and had there an op-

portunity to request the Board to determine that the employees who are the subject of this Grievance do not belong in the Salaried Unit, but the Petitioner did not see fit to challenge the appropriateness of the Salaried Unit represented by the Federation.

(Sworn to by K. H. Smith on October 7, 1960.)

[fol. 115]

EXHIBIT A TO SUR-REPLY AFFIDAVIT OF K. H. SMITH

copy

IUE AFL CIO, Local 130
Baltimore, Maryland

Local Grievance No. 1055

Foreman's Name:
Art Wheeler

Date Presented:
March 5, 1958

Steward's Signature:
Marie C. Wright

Dept:
Industrial Electronics

STEP 1 Nature of Grievance:

The Union contends that the employees working on induction heating and are performing assembly and wiring; power brake operations; machining operations; and attending to the tool crib and storeroom operations should be in the IUE, Local 130 bargaining unit.

/s Marie C. Wright

[fol. 116]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

OPINION OF McGIVERN, *J.*

(New York Law Journal, April 5, 1961)

Matter of Carey (Westinghouse Electric Corp'n)—Petitioner-union and respondent-employer being in disagreement concerning the arbitrability of four grievances arising at different plants of the employer, the union seeks an order to compel arbitration in accordance with the contractual directive that arbitration may not proceed until after a court has determined that such grievance raises an arbitrable issue.

The collective bargaining agreement provides grievance procedures for the settlement of any dispute. It also provides for arbitration of those unsettled grievances which embrace "the interpretation, application or claimed violation of a provision of this agreement" or "a disciplinary penalty, release or discharge which is alleged to have been imposed without just cause". However, there are express limitations on the authority of the arbitrator, so that, among other things, he may not "add to, detract from or in any way alter the provisions of this agreement", nor "establish or modify any wage or salary rate * * * or any time value under the incentive system".

Determination of the issue of arbitrability requires analysis of each of the four grievances in the light of the applicable principles in this field enunciated by our highest court. The policy to be applied here is that declared by Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. Sec. 173(d) which states, "Final adjustment by a method agreed upon by the parties [fol. 117] is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement * * *". This section has been fashioned by the federal courts to govern such a situation (Textile Workers Union of America v. Lincoln Mills, 1957, 353 U.S. 448).

In three recent landmark cases (United Steelworkers of America v. American Mfg. Co., 1960, 363 U.S. 564; United Steelworkers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593), the Supreme Court set forth the principles which should guide a court when the question of arbitrability is raised. The Court in those cases pointed out that arbitration of labor disputes, being intended as a substitute for industrial strife, has a quite different function from arbitration under an ordinary commercial agreement and that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate" (Warrior & Gulf Co. case at p. 578). It is "an effort to erect a system of industrial self-government" (id. at p. 580).

The intention is that the arbitrator shall "sit to settle disputes at the plant level—disputes that require for their solution knowledge of the customs and practices of a particular factory or of a particular industry as reflected in [fol. 118] particular agreements" (Enterprise Wheel & Car Corp. case at p. 596). "The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished * * *" (Warrior & Gulf Co. case at p. 582).

The Supreme Court has also said that "The function of the court is very limited when the parties have agreed to submit questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator * * *. The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument

which will support the claim" (American Mfg. Co. case at pp. 567-568), and that "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage" (Warrior & Gulf Co. case at pp. 582-583).

[fol. 119] However, since arbitration must necessarily have a consensual basis, it was also pointed out that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (id. at p. 582).

I. National Appeal Grievance No. 1971-C.

This grievance involves the refusal of the Company to permit an employee, absent during an illness lasting over 13 months, to return to her job when she allegedly was unable to meet its required physical standards for employment or re-employment. The Union urges arbitrability under the clause covering releases or discharges "without just cause". The Company claims that, in accordance with its practice, this employee's name was after one year of absence removed from its disability rolls, thereby terminating her employment status, so that the subsequent refusal to re-employ her did not constitute a release or discharge within the ambit of the arbitration clause. It contends that it did not consent to submit to arbitration matters relating to the conditions of employment, such as the physical standards fixed by it for employment or re-employment.

Clearly, this is a case of release or discharge, rather than re-employment. The right to arbitrate a question of involuntary termination of employment cannot be denied because of a unilateral practice of the Company not expressly recognized in the collective bargaining agreement. [fol. 120] The entire issue of "just cause" must be decided by the arbitrator, not the Company. In United Steelworkers of America v. American Manufacturing Company, supra, the court held arbitrable an analogous dispute involving a return to work after an injury and a claim of physical inability to do the job (see, also, Maryland Tele-

phone Union v. Chesapeake & Potomac Telephone Co., U.S.D.C., D. Maryland, 187 F. Supp. 101).

The Company also raises the question of laches in the Union's failure to petition the court for more than two years after consent to arbitrate this grievance had been refused. It alleges prejudice by virtue of the death in the interim of the company physician who had examined this employee. Since no time limit for the institution of a court proceeding is set forth in the agreement, such matters as timeliness, prejudice and laches, as any other question involved in the equities or merits of the grievance, must be addressed to the arbitrator.

II. National Appeal Grievance No. 2547-C.

This grievance has to do with the following provision in the collective bargaining agreement: "The [Union] will not oppose the return of supervisory employees to a bargaining unit provided that at the time of promotion they worked on a job which is in the bargaining unit at the time of such return. • • • The employee will be returned to a job, if any, in the bargaining unit to which his seniority entitles him."

[fol. 121] A supervisory employee was returned to a position in his former unit, but to a different job title than that which he had originally held because the former job title had been eliminated. A month later he quit the employ of the Company.

The Union's position is based on the first of the above-quoted sentences, while the Company relies on the last. The Company also semantically argues that the provision does not limit its right to return supervisory employees, since the opening phrase refers only to the fact that the Union "will not oppose" such return under certain conditions. Manifestly, whatever ambiguity arises from the combination of the two sentences is a matter for interpretation by the arbitrator. This is not a case of contract alteration but of contract interpretation (cf. Assn. of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 188 F. Supp. 225, aff'd 283 F. 2d 93, U.S.C.A., Third Circuit, 1960).

Nor is arbitration precluded because this particular employee has now quit the job. The parties agreed to submit to arbitration any grievance involving "the interpretation, appplication *or* claimed violation of a provision of this agreement" (emphasis added). Petitioner is entitled to "a declaration of the rights and obligations of the parties" to settle an existing dispute of "interpretation" (Matter of Acme Backing Corporation, 2 N Y 2d 963) even in the absence of present "application", particularly where, as here, it did not originate as an academic issue. Whether [fol. 122] the arbitrator will attempt to formulate a general rule or confine himself to the facts of the case or possibly refuse, for valid reasons in his judgment, to entertain the grievance as moot, need not be considered on this threshold application. It is simply held that this dispute concerning the interpretation of a specific provision of the agreement which has arisen between the parties is a matter to be decided by the arbitrator.

III. National Appeal Grievance No. 2079-A.

In 1957 the Company lowered the time value for an operation known as molding. "Time Value" is the period of time fixed by time study, formula, comparison or estimate as the normal time for that particular operation, the "incentive" being in the form of additional compensation for performance in less time.

The Union's grievance is that this 1957 change in time value embraced not only a recent change in method or material but also reflected all changes in the operation going back to 1938. It claims violation of the provision in the agreement that "Management recognizes that time values should be revised as soon as possible after changes have been completed".

The Company contends that since the only effective relief the arbitrator could grant would be to direct it to alter the time value it established in 1957, the grievance is not arbitrable in view of the express contractual prohibition [fol. 123] against establishment or modification of time values by the arbitrator.

To accept the Company's view that because there is no indicated remedy for any violation on its part of the quoted provision concerning prompt revision of time values, the matter is wholly beyond the scope of arbitral consideration would deprive this clause of any force or meaning, though it is a part of the agreement which it made.

Present judicial inquiry need go no further than to determine that a claimed violation is presented which on its face is governed by the contract. The nature of the relief which may be granted by the arbitrator is not a matter of concern at this stage. "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware" (Steelworkers v. American Mfg. Co., 363 U.S. at p. 568). Arbitrations may at times furnish a safety-valve for troublesome situations. As stated by the Supreme Court the arbitrator is "to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations" (Steelworkers v. Enterprise Corp., 363 U.S. at p. 597). The problem concerns itself with the "claimed violation of a provision of this agreement" and not any claimed power of the arbitrator to "establish or modify any wage or salary rate * * * or any time value under the incentive system". Any question as to the award being in violation [fol. 124] of the prohibition clause should await its rendition.

IV. National Appeal Grievance No. 2286-G.

This grievance poses a problem of union representation affecting the rights of certain employees to choose their own bargaining representative and the right of another union to be made a party to a proceeding seeking the relief herein prayed for—a problem which can be resolved only by the National Labor Relations Board (NLRB). Such relief cannot be granted under the guise of contract interpretation.

At the plant in question two separate employee units for collective bargaining purposes were established by NLRB: (1) production and maintenance employees (called "Pro-

duction and Maintenance Unit"); (2) all salaried technical, clerical, supervisory, etc., employees (called "Salaried Unit"). At separate elections held by NLRB petitioner's predecessor was chosen by a majority of the former, while another union, "Federation", was chosen by a majority of the latter. Each union thereupon entered into a separate collective bargaining agreement with the Company. The agreements expressly stipulate that the Company recognizes the respective unions for those units, for which, after NLRB certification, it was lawfully designated as exclusive bargaining representative, and then proceed to describe those units. In petitioner's agreement the units here involved for which it has been certified are described as "all [fol. 125] production and maintenance employees at its Baltimore works but excluding all salaried technical, office and clerical employees * * *".

At the time of the original NLRB proceeding there was in existence an engineering laboratory at this plant where models were individually built. The laboratory required the services of several expert machinists and operators, who were paid and considered as salaried technical employees, as distinguished from the regular production and maintenance employees who were paid on an hourly basis. These laboratory employees were all included by the NLRB determination in the Salaried Unit, voted in that unit's election, and are represented by "Federation".

Since that election the Company has assigned a number of production and maintenance employees to do work for the laboratory. There is a sharp discrepancy between the parties as to the number of employees affected, the Union apparently claiming the device to be a subterfuge to deprive it of members, while the Company maintains that there is involved only a handful of employees upgraded according to the necessities of the business to do more skilled, salaried technical work for the laboratory. The Union argues that the work they are doing is actually production and maintenance work.

The Union's grievance is that the Company has refused to apply the agreement, its union recognition clause and unit definition, to the production and maintenance employees engaged in the work assigned by the laboratory.

[fol. 126] It claims this involves merely an interpretation of the pertinent sections of the agreement.

The Union's demand, it has been noted, is not limited to production employees transferred subsequent to the election but would cover all employees doing production and maintenance work for the laboratory, even those salaried technical employees employed as such at time of election and represented at all times by "Federation". Furthermore, it should be noted that the Company has the right to add or transfer employees to do work for the laboratory on a salaried basis because of their special skills or increase in its work load.

Since the original determination that production workers for the laboratory were salaried technical employees includable in the Salaried Unit for collective bargaining purposes was made under NLRB auspices, any grievance concerned with the representation of salaried technical employees must be deemed to be within the exclusive jurisdiction of NLRB. Moreover, "Federation" should be a party to such a proceeding and would be only in an NLRB proceeding.

In Matter of Amperex Electronic Corporation, 284 App. Div. 808, First Department, 1954, the employer did not establish its laboratory until after the NLRB election and only then did it employ "technicians". The court held that the question of whether the "technicians" were within the bargaining unit of "production and maintenance employees" was not an arbitrable issue. That case is *a fortiori* dis- [fol. 127] positive of this grievance. The distinction between salaried technical employees and production and maintenance employees was previously made by NLRB and all the employees working for the laboratory were in effect placed by the Board in the separate Salaried Unit.

This is not a case merely of a breach of an agreement which also happens to constitute some unfair labor practice under the federal statute. This might be so if the grievance presented only a superficial change of title, with no involvement of the rights of another union, or of other employees, to choose their bargaining agent in accordance with prior certification of respective bargaining units. This is a grievance which involves the fundamental issue of representation and certification of the composition of a bargaining unit which is solely the province of NLRB. Recognition

of this grievance as an arbitrable issue would be fraught with potential conflict and disrupt the federal scheme in a sensitive and delicate area of industrial relations which has been placed under the exclusive jurisdiction of the National Board. (See Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 776, 1947; LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18, 1949).

The Union's application is accordingly granted as to the first three grievances herein enumerated and denied as to the fourth. Settle order.

[fol. 128]

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FIRST DEPARTMENT

STIPULATION AS TO EXHIBIT—June 28, 1961

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following-described exhibit need not be printed or reproduced in the record on appeal, but that copies thereof will be handed up to the Court by James B. Carey, etc., petitioner-appellant-respondent herein, on the argument of the appeals herein and may be referred to in the briefs and on the argument with the same force and effect as if incorporated in the printed record on appeal.

1. Agreement between Westinghouse Electric Corporation and International Union of Electrical, Radio and Machine Workers (A.F.L.-C.I.O)—(handed up by [fol. 129] counsel for petitioner at the time of oral argument on the motion before Special Term).

New York, N. Y., June 28, 1961.

Cravath, Swaine & Moore, Attorneys for Respondent-Respondent-Cross Appellant.

Lieberman, Katz & Aronson, Attorneys for Petitioner-Appellant-Respondent.

So Ordered:

BB

[fol. 130]

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the Notices of Appeal, the order appealed from and all the papers upon which the Court below acted in making said order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York; and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated: New York, N. Y., September , 1961.

Lieberman, Katz & Aronson, Attorneys for Petitioner-Appellant-Respondent.

Cravath, Swaine & Moore, Attorneys for Respondent-Respondent-Cross-Appellant.

[fol. 131]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter

of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A. F. L.-C. I. O., Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION, Respondent.

NOTICE OF APPEAL TO COURT OF APPEALS—January 4, 1962

Sirs:

Please take notice that petitioner, James B. Carey, as President of International Union of Electrical, Radio and Machine Workers, A. F. L.-C. I. O., hereby appeals to the

Court of Appeals of the State of New York from the order of modification of the Appellate Division of the Supreme Court, for the First Judicial Department, made in this proceeding and filed in the office of the Clerk of said Appellate Division on the 14th day of December, 1961, and a certified copy thereof filed in the office of the Clerk of the County of New York on the 26th day of December, 1961, insofar as it modified the final order entered in the proceeding in the office of the Clerk of the County of New York on the 18th day of April, 1961, by reversing that [fol. 132] portion thereof which granted the motion to compel arbitration of National Grievance No. 2079-A and by affirming that portion thereof which denied the motion to compel arbitration of National Grievance No. 2286-G, and by denying the motion to compel arbitration of both of the aforesaid grievances.

Dated: New York, New York, January 4, 1962.

Yours, etc.

Lieberman, Katz & Aronson, Attorneys for Petitioner, 1501 Broadway, New York 36, New York.

To:

Clerk of the County of New York.

Cravath, Swaine & Moore, Esqs., Attorneys for Respondent, 15 Broad Street, New York, New York.

[fol. 134]

In Supreme Court of the State of New York

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 14th day of December, 1961.

Present: Hon. Bernard Botein, P. J., Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon. Samuel W. Eager, Hon. Aron Steuer, J. J.

No. 4098.

In the Matter

of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A. F. L.-C. I. O., Petitioner-Appellant-Respondent,

—against—

WESTINGHOUSE ELECTRIC CORPORATION, Respondent--Respondent-Cross-Appellant.

ORDER OF MODIFICATION OF APPELLATE DIVISION APPEALED FROM—December 14, 1961

An appeal having been taken to this Court by the Petitioner-Appellant-Respondent, from so much of an order of [fol. 135] the Supreme Court, New York County, entered April 18, 1961, in New York County, as denied petitioner's motion for an order that arbitration proceed between the parties with respect to an unsettled grievance known to the parties as National Grievance No. 2286-G; and a cross-appeal having been taken by Respondent-Respondent-Cross-Appellant from the same order insofar as it grants petitioner's motion and directs that arbitration proceed between the parties in respect of the unsettled grievances known to the parties as National Grievance Nos. 2079-A and 1971-C.

And said appeal and cross-appeal having been argued by Mr. Isadore Katz, of counsel for Petitioner-Appellant-Respondent, and Mr. John F. Hunt, Jr., of counsel for Respondent-Respondent-Cross-Appellant; and due deliberation having been had thereon, and upon the opinion of the Court in which all Justices concurred except Eager, J., and upon the dissenting opinion of Eager, J.,

It is hereby ordered that the order appealed from be modified, on the law and on the facts, by denying the motion to compel arbitration of National Grievance Nos. 2079-A and

2286-G and granting the petitioner's motion to compel arbitration of National Grievance No. 1971-C, and as so modified, affirmed without costs.

Enter:

A. S.

[fol. 136]

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

October 1961

Bernard Botein, P.J., Francis L. Valente, Harold A. Stevens, Samuel W. Eager, Aron Steuer, JJ.

4098

Cross appeals by petitioner and respondent respectively from so much of a final order of the Supreme Court at Special Term (McGivern, J.), entered April 18, 1961, in New York County, as (1) denies that part of petitioner's motion for an order directing that arbitration proceed in the manner provided for in the arbitration agreement contained in the collective bargaining agreement, and as (2) grants petitioner's motion and directs that arbitration proceed.

Isadore Katz of counsel (Lieberman, Katz & Aronson and Benjamin Sigal, attorneys) for petitioner-appellant-respondent.

John F. Hunt, Jr. of counsel (John D. Calhoun with him on the brief; Cravath, Swaine & Moore, attorneys) for respondent-respondent-cross-appellant.

[fol. 137]

OPINION OF APPELLATE DIVISION—November 21, 1962

STEUER, J.:

Petitioner, a labor union, instituted this proceeding to compel respondent to arbitrate four grievances. As to one of these, the disposition of Special Term has been acquiesced in by the parties and is not before the Court.

Special Term directed arbitration on two of the grievances and dismissed the petition as to the other. Both parties appeal from the decision in so far as it is adverse to their contentions.

The first grievance, numbered 2079-A, arose in the company's East Pittsburgh plant. For many years the company had an incentive pay program in connection with which it established time values for various operations. From time to time these time values were changed in accordance with changing conditions of operation. The collective bargaining agreement contains the provision: "Management recognizes that time values should be revised as soon as possible after the changes have been completed." (Agreement, Section VIII, § E(2)(c).) In October, 1957, a major change in time value of a molding operation was put into effect. The union claims that the change embraced variances which had accumulated over a period of several years. The union protests the change on the ground it was not timely made in accordance with the Agreement. Special Term ordered arbitration.

The equivocal wording of the phrase relied on, not constituting an agreement, is understood when another clause of the bargaining agreement is considered:

> [fol. 138] "Notwithstanding any other provisions of this Agreement, no arbitrator shall . . . be authorized to:
>
> ". . .
>
> "(2) Establish or modify any wage or salary rate . . . or any time value under the incentive system." (Section XIV-A, D)

When both these provisions are taken into consideration the contractual intent stands revealed. This is the primary guide to the solution of the problem presented (*Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574). The intent is that incentive pay, like all other rates of wage, being the result of completed negotiations, is not subject to further adjustment by arbitration. While the company expressed a policy of implementing the time values to operating

changes as soon as possible, there is no undertaking in that regard. Actually the delay favored the workers. Improvement in processes reduced time values. But until the change was reflected in the reduced time value the worker enjoyed the rate still in effect. When the change was reflected in the incentive pay, the demand to arbitrate followed promptly. But the contract leaves nothing for the arbitrator to determine. What the union really wants determined is that the change in time value—reflecting as it does several minor changes of long standing—should not be allowed to stand because of the delay in effectuating it. But such a decree the arbitrator cannot render.

There is a school of thought, to which Special Term subscribed, that prior to the award the court should not [fol. 139] concern itself with what the arbitrator may decide but that this should be made to await an application to confirm the award. For example, here, if the arbitrator does change the time value, his award may be vacated on such a motion. We believe that whether court action should precede or succeed the arbitrator's award is not subject to unbending rule but presents a question requiring consideration of the nature of the objection and the scheme of the agreement providing for arbitration. The Agreement here provides (Section XIV-A, C (5)) that if either party notifies the American Arbitration Association (which is the body designated to implement arbitrations under the Agreement) that no arbitrable issue is raised, the said Association cannot proceed to process the arbitration until the court has finally determined that there is an arbitrable issue. This provision shows an intent that such questions should be determined before, not after, arbitration has been had. Evidently the parties regarded the saving in time and energy as more important to them than the therapeutic value which the processing of even frivolous claims may have (*Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568). Here no basis can be found for vitiating the expressed and implemented intent of the parties. As the arbitration cannot result in an effectual award, the demand to arbitrate must be denied.

The second grievance is numbered 1971-C. It arose in the company's plant at Mansfield, Ohio. An employee suf-

fered a protracted illness. After she was away from the plant for a year the company dropped her name from its [fol. 140] rolls, thereby effectuating a discharge. About a month later she applied for a position and was given a physical examination by a company doctor who reported that her condition was not such as to warrant her being hired. An examination by her own physician resulted in an opposite opinion. Some months later the union filed this grievance. In the interim the company doctor who had made the examination died.

There is no doubt that a discharge is subject to arbitration (*Carey* v. *Westinghouse*, 6 A D 2d 582, affd. 6 N Y 2d 934). Nor can there be any dispute but that the grounds and method of discharge have never been assented to by the union. So, on its face, the demand for arbitration is unexceptionable. The company raises two objections. The first is that the union does not really object to the discharge but only to the failure to rehire, which is evidenced by the fact that no protest followed the discharge but only eventuated when the former employee's application for a position was rejected. The failure to hire any individual is neither a grievance nor arbitrable. The second objection is that the demand is unavailable because of laches, and the delay is claimed to be prejudicial due to the death of the medical witness.

These objections are mutually contradictory. If the arbitration is confined to the discharge, the failure to rehire and the reasons therefor do not constitute issues. The union argues that in any event laches is a matter for the arbitrator to consider. Undoubtedly this would be so if the laches was a failure to make a timely demand for per- [fol. 141] formance of the contract (*Matter of Lipman*, 289 N. Y. 76). Where the laches is asserted to bar the exercise of the right to arbitrate, the question is not so clear. The court must always decide whether there is an agreement to arbitrate and, ordinarily, this necessity would include a determination of whether the agreement has terminated, either by its terms or the interpretation put upon it by the parties. But where the agreement is in effect, the disposition of whether the particular claim has been shown to be

abandoned by the failure to assert it is a matter of defense for the arbitrator to decide.

The other objection is based upon the presumption that the arbitrator will not pass upon the question of discharge but will adjudicate on the question of failure to rehire. This is an assumption that the court may not indulge in. We agree with Special Term that this grievance should proceed to arbitration.

The remaining grievance is 2286-G and arose in the Baltimore plant. It appears that the company has three classes of employees. One class, composed of clerical help, guards, etc., are not members of either the petitioner union or the Federation of Westinghouse Independent Salaried Unions (herein Federation) and are not involved in any way on this application. Of the others, some are engaged in production and maintenance work on a time basis and are members of petitioner union. The balance are engaged in experimental work, are salaried, and are members of Federation. It should be observed that the distinction between production and maintenance on the one hand and experi- [fol. 142] mental work on the other is not so much a distinction in operative procedures as it is in the purpose for which the work is performed. Generally speaking, while in many instances the same operation is performed at the machines, the experimental work is deemed finer and the designation of an employee to the salaried division is described in the papers as a promotion.

The grievance stated is that certain employees doing certain work at Wilkens Avenue, Baltimore (the site of the experimental work) are actually doing production work and the petitioner union should be recognized as the bargaining agent for these workers. Special Term decided that as the grievance embraced all workers so engaged, including those who were in the salaried class at the time the differentiation was made and the workers selected the respective unions to represent them, the matter was not arbitrable. This conclusion was influenced by the fact the respective unions had been selected under the auspices of the National Labor Relations Board (herein NLRB) and that the question was exclusively determinable by the NLRB. While we

reach a similar conclusion, namely, that the issue is not arbitrable, we do not arrive at it in precisely the same way.

We start with the proposition that a breach of contract does not become *ipso facto* incapable of arbitration because it also happens to be an unfair labor practice (*Lodge No. 12* v. *Cameron Iron Works*, 257 F. 2d 467, U. S. C. A. 5th Circuit). In other words, the field is not preempted. On the other hand, where the NLRB has assumed jurisdiction the orderly process of justice demands that the matter [fol. 143] should not be submitted to another forum, even though a breach of contract may be involved (*Matter of Amperex Electronic Corporation*, 284 App. Div. 808). The dividing line between these extremes would seem to be best fixed at that point where the peculiar expertise of the NLRB has found expression. Undoubtedly one of the fields in which it has so found expression is that of representation. The claims of conflicting unions representing different classifications of employees within one company may be said to be its special province. And there are, of course, other fields. When it is sought to invade one of those fields it is immaterial whether the interference is contemporaneous with the Board's decision (as in *Matter of Amperex, supra*) or seeks to avoid it by a subsequent application to arbitrate (*Matter of Apex Lbr. (Teamsters Local)*, 15 Misc. 2d 15), or seeks to anticipate it, as here. That is not to say that where the question of contract breach is direct and the question of representation is peripheral, arbitration may not be had. It may. (*Freight Drivers* v. *Quinn Freight Lines*, 195 F. Supp. 180, U. S. D. C., Mass.)

The exact position of the issue, vis-a-vis the existing framework of the union representations within the company, must be the deciding factor in a determination of whether the issue is the exclusive province of the NLRB or whether it may also be arbitrable. From the facts revealed on this application, including the extent of the demand for arbitration which clearly encroaches, we conclude that or- [fol. 144] derly process is best served and contract principles are not violated by limiting jurisdiction of the issue here to the NLRB and denying recourse to arbitration.

The order should be modified, on the law and on the facts, by denying the motion as regards grievance 2079-A and, as so modified, affirmed without costs.

All concur except Eager, J., who dissents in part in opinion.

[fol. 145]

EAGER, J. (dissenting in part):

The majority, in affirming Special Term with respect to grievance No. 2286-G, do not adopt the reasoning of Special Term which concluded that the questions involved in the grievance were exclusively determinable by the N. L. R. B.; and the majority state that "the field is not preempted". This has support in the decisions. In *Matter of Klein* v. *Style-Rite Optics, Inc.*, 8 A. D. 2d 811, 812, we said, "There is no question but that there is no pre-emption of enforcement by arbitration or by action in a state court of voluntary agreements merely because a breach might also invoke a federal remedy". See further, *Matter of Carey (Westinghouse Electric)*, 6 A. D. 2d 582, affd. 6 N. Y. 2d 934; *Lodge No. 12, Etc.* v. *Cameron Iron Works*, 257 F. 2d [fol. 146] 467; *Freight Drivers and Helpers Local 557, Etc.* v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180; *Post Publishing Co.* v. *Cort*, (Mass.) 134 N. E. 2d 431.

The fact that incidentally there may be involved a controversy between the petitioner union and a rival union as to right of representation is immaterial on the question of whether or not the petitioner union is entitled to proceed to arbitration upon a grievance involving the interpretation or alleged breach of provisions of the contract. The argument that the real dispute is between two unions "ignores the fact that the parties by contract agreed to negotiate individual agreements covering any operations in which members of the plaintiff union were not employed, and to arbitrate any differences. The union should not be forced to abandon its rights under the contract simply because the Board may also have jurisdiction of a portion of this dispute." *Freight Drivers and Helpers Local 557, Etc.* v. *Quinn Freight Lines, Inc., supra*, p. 182.

There being no preemption depriving this court or the arbitrators of jurisdiction, then this court is bound to give effect to the agreement of the parties. The contract here required Westinghouse to recognize the petitioner union

as the representative of production and maintenance employees, and a refusal of Westinghouse to do so would constitute a breach of contract. Under the express terms of the contract, a grievance involving the interpretation of the provisions of the contract appertaining to such an alleged breach, and the rights and obligations of the parties in connection therewith, constitutes an arbitrable grievance. Having by their agreement chosen a particular forum [fol. 147] for determination of such a grievance, the parties may not be relegated to remedies before another forum upon the ground that the latter forum is more expert in the particular field or that orderly process would be best served by proceeding before said forum.

Furthermore, the court may not now concern itself with the merits of the grievance (see *Matter of Fownes. Bros. (Glove Cutters)*, 14 A. D. 2d 235) nor with questions pertaining to the jurisdiction of the arbitrators over particular phases of the dispute. The questions of law and fact with respect to the grievance are for the arbitrators, and this, in my opinion, would include questions as to their jurisdiction over particular phases of the grievance, incidental or otherwise. See *Matter of Carey (Westinghouse) supra, Post Publishing Co.* v. *Cort, supra.*

Finally, there is nothing policy-wise which justifies this court in refusing to give effect to the contract that the parties have made. There is no pending proceeding before the N. L. R. B. involving this particular grievance, and the jurisdiction and processes of the Board are not being interfered with. The Federal Act specifically provided that the power of the Board over unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U. S. C. A., Section 160, Subd. a. "Since the Board's power is plenary in all respects, 'neither the existence of an agreement to arbitrate nor a rendered [fol. 148] award can preclude the Board from exercising its statutory jurisdiction.' But certainly an award or an agreement to arbitrate may serve to temporarily assuage the aggrieved party and afford validity to contract terms (even including unfair labor practices) until a final disposition of the matter of unfair labor practice be made by the Board.

Even though the Board is not bound by an arbitration award, it may find that compliance with the award is not violative of the Act, or it may even, in the exercise of its discretionary power, decline action because an award has been made or arbitration is possible." *Lodge No. 12, Etc.* v. *Cameron Iron Works, supra,* p. 473.

Voluntary arbitration of disputes in labor matters may exist and should be utilized as a remedy concurrent with the full functioning of the National Labor Relations Board. See *Lodge No. 12, Etc.* v. *Cameron Iron Works, supra.* It may so exist and be utilized here. Therefore, I would reverse the order of Special Term insofar as it denies the motion to compel arbitration of grievance No. 2286-G, and I would direct arbitration of such grievance. Otherwise, I concur in the majority opinion.

[fol. 149]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter

of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A. F. L.-C. I. O., Petitioner-Appellant,

—against—

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent-Cross-Appellant.

STIPULATION DISPENSING WITH PRINTING OF EXHIBIT—February 1, 1962

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following-described exhibit need not be printed or reproduced in the record on appeal, but that copies thereof will be handed up to the Court by James B. Carey, etc., petitioner-appellant herein, on the argument of the appeal herein and may

be referred to in the briefs and on the argument with the same force and effect as if incorporated in the printed record on appeal:

Agreement between Westinghouse Electric Corporation and International Union of Electrical, Radio and Machine Workers (A. F. L.-C. I. O.)—(handed up by counsel for petitioner at the time of oral argument in the motion before Special Term).

February 1, 1962.

Lieberman, Katz & Aronson, Attorneys for Petitioner-Appellant.

Cravath, Swaine & Moore, Attorneys for Respondent-Cross-Appellant.

[fol. 150]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

STIPULATION WAIVING SECURITY—February 1, 1962

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that petitioner-appellant need not give security to perfect his appeal and respondent-cross-appellant need not give security to perfect its cross appeal.

Dated: New York, New York, February 1, 1962.

Lieberman, Katz & Aronson, Attorneys for Petitioner-Appellant.

Cravath, Swaine & Moore, Attorneys for Respondent-Cross-Appellant.

[fol. 151]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS—February 1, 1962

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing consists of a true and correct copy of the Record on Appeal to the Appellate Division, First Department, the order of modification, the Notice of Appeal to the Court of Appeals and the Notice of Cross Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the County of New York, as well as the opinion of the Appellate Division, First Department and the opinion of Eager, J., dissenting, which are on file in the office of the Clerk of that Court.

Certification of all of the foregoing papers is hereby waived.

February 1, 1962.

Lieberman, Katz & Aronson, Attorneys for Petitioner-Appellant.

Cravath, Swaine & Moore, Attorneys for Respondent-Cross-Appellant.

[fol. 152] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 153]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

No. 150

Unrevised and Uncorrected.
Not for Publication.

In the Matter of

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O., Appellant-Respondent,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, Respondent-Appellant.

OPINION

PER CURIAM:

We are in accord with the disposition of the Appellate Division in modifying the order of Special Term.

This appeal, the facts of which have been sufficiently set forth in the opinions below, results from a motion to compel the arbitration of three grievances. Arbitration has been ordered as to one, and denied as to the others.

Whether the grievance at the Mansfield, Ohio plant actually concerns re-hiring or discharge is properly a matter to be decided by the arbitrator. Furthermore, the Company is not prejudiced by the inartful manner in which the complaint was originally drawn, since it clearly understood the thrust of the problem.

As to the delay in seeking a court order for arbitration, allegedly amounting to an abandonment of the claim in this case involving a collective bargaining agreement, that question should be argued in the forum which the parties have voluntarily chosen—arbitration (See, *Matter of Straight Line Foundry & Machine Corp.* v. *Wojcik*, 9 N.Y. 2d 867; *Matter of Novelty Fabrics Corp.* v. *Fink*, 2 N.Y. 2d 894; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574; *Steelworkers*

v. *Enterprise Corp.*, 363 U. S. 593). Nothing herein, however, is to be construed as changing decisions in the usual [fol. 154] arbitration cases, such as *Matter of Zimmerman* v. *Cohen*, 236 N.Y. 15.

We think that the grievance arising at the East Pittsburgh plant, involving the "time value allowance", was not covered by the provisions of the collective bargaining agreement which provided for arbitration. "[S]ince arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute" (*Steelworkers* v. *American Mfg., supra*, 570-571). The parties here having agreed that no arbitrator should have authorization to "establish or modify" time values, it is clear that such problems had, by agreement, been taken out of the arbitration process outlined in the contract. To submit such a grievance to arbitration now would be an idle gesture, as no valid award could be made. Nowhere in the collective bargaining agreement is there a statement which could be construed to mean that there has been an agreement for "therapeutic" arbitration, incapable of enforcement.

Not only is the character of the time values which may have been set in the original agreement to be determined here (See, *Radio Corporation of America* v. *Association of Professional Engineering Personnel*, 291 F. 2d 105; *International Union of Electrical, Radio and Machine Workers* v. *Westinghouse Electric Corporation*, 268 F. 2d 352), but in addition how much, if at all, pre-existing changes in procedures could be incorporated into management's change of the time values. This must, necessarily, encompass an equitable modification of existing values, which is beyond the range of the authority granted to the arbitrator by the parties (See, *Underwood Corporation* v. *Local 267, International Union of Electrical, Radio & Machine Workers*, 183 F. Supp. 205; *Sunnyvale Westinghouse Salaried Employees Association* v. *Westinghouse Electric Corporation*, 175 F. Supp. 685).

Finally, the grievance at the Baltimore plant, involving [fol. 155] the definition of the bargaining units, seems to us under federal law to be within the exclusive jurisdiction of NLRB, which has the expertise to make clear the precise

nature of the bargaining units certified by it. This view has recently been re-affirmed by the United States Supreme Court, in the following language (*Marine Engineers Beneficial Assoc.* v. *Interlake Steamship Co.*, —— U.S. ——, 30 LW 4437, June 11, 1962):

> "A centralized adjudicatory process is also essential in working out a consistent approach to the status of the many separate unions which may represent interrelated occupations in a single industry. Moreover, as the national agency charged with the administration of the federal labor law, the Board should be free in the first instance to consider the whole spectrum of possible approaches to the question, ranging from a broad definition of 'labor organization' in terms of an entire union to a narrow case-by-case consideration of the issue. Only the Board can knowledgeably weigh the effect of either choice upon the certainty and predictability of labor management relations, or assess the importance of simple administrative convenience in this area.
>
> . . . . . .
>
> The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the Board. While the Board's decision is not the last word, it must assuredly be the first. In addition, when the Board has actually undertaken to decide an issue, relitigation in a state court creates more than a theoretical danger of actual conflict between state and federal regulation of the same controversy."

The First Circuit appears to have reached the same conclusion, in reversing the District Court, in *Raytheon Co.* v. *Local Lodge No. 1836 of District 38 IAM*, —— F. 2d ——, 50 LRRM 2337, decided June 4, 1962. (See also, *International Chemical Workers Union* v. *Olin Mathieson Chemical Corporation*, 202 F. Supp. 363).

The order appealed from should be affirmed, without costs.

[fol. 156] FULD, J. (dissenting in part):

I would modify the order appealed from by reversing so much of it as denies arbitration of the Baltimore plant grievance.

The fact that the matter sought to be arbitrated, turning as it does on a bargaining unit description in the contract's recognition clause, may also involve an unfair labor practice or a question concerning representation which may ultimately give rise to a proceeding before the National Labor Relations Board does not deprive the court of authority to order arbitration and enforce the agreement.

The underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process. (See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Co.*, 363 U.S. 593; *Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 504; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95.)

The controlling statute, section 301 of the National Labor-Management Relations Act, envisages parallel private and public proceedings in situations where a breach of an agreement also involves determinations under the Act. Section 301 was designed to vindicate private rights under a contract, while section 8, relating to unfair labor practices, and section 9, relating to representation, were designed to [fol. 157] vindicate public rights provided under the National Labor Relations Act. The circumstance that there might be a claim before the National Board *at some date in the future* should not operate to deprive the parties of contract rights at the present time. (But cf. *Raytheon Co.* v. *Local Lodge No. 1836 of District 38 IAM*, —— F. 2d —— [50 LRRM 2337, decided by Court of Appeals, First Circuit, June 4, 1962, revg. 201 F. Supp. 334, in which two unions had actually asserted conflicting claims as to representation.) The pre-emption postulates enunciated by the Supreme Court over the past several years (see, e.g., *Garner* v. *Teamsters Union*, 346 U.S. 485; *San Diego Unions* v.

Garmon, 353 U.S. 26; *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, —— U.S. ——, decided June 11, 1962) concerned actions instituted in state courts to remedy torts which were, arguably, an unfair labor practice or, arguably, a protected activity under the Federal statute.[1] The prohibitions spelled out in those cases against state court intrusion upon the exclusive jurisdiction of the National Labor Relations Board have no applicability to actions for breach of a collective bargaining agreement.

The collective bargaining agreement governing wages, hours and conditions of employment is the ultimate objective of the labor relations laws. Arbitration is an integral part of the administration and enforcement of the collective bargaining agreement, and Federal and State court sanction an essential aid to such process.

* * *

[fol. 158] Order affirmed, without costs. Opinion Per Curiam. All concur except Fuld, J., who dissents in part and votes to modify in a separate opinion.

[fol. 159]

No. 150

IN COURT OF APPEALS OF THE STATE OF NEW YORK

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of July in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

---

[1] In any event, since there was here no claim that the union restrained or coerced the employees or engaged in or encouraged the employees to engage in a strike or resorted to any of the other activities defined in section 8 (b) of the National Labor Relations Act, there is no basis for any charge that the union was guilty of unfair labor practice or prohibited conduct under that statute.

[fol. 160]

No. 150

In the Matter of

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O., Appellant-Respondent,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, Respondent-Appellant.

REMITTITUR—July 6, 1962

Be it Remembered, That on the 7th day of April in the year of our Lord one thousand nine hundred and sixty-two, James B. Carey, as President of International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O., the appellant-respondent in this cause, came here unto the Court of Appeals, by Lieberman, Katz & Aronson, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Westinghouse Electric Corporation, the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Cravath, Swaine & Moore, its attorneys, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 161] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Isadore Katz, of counsel for the appellant-respondent, and by Mr. John F. Hunt, Jr., of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 162] Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 164]

At a Special Term, Part II of the Supreme Court, held in and for the County of New York at the Court House thereof, New York, New York, on the 10th day of September 1962.

Present: Hon. Samuel M. Gold, Justice.

Index No. 8637/1960

In the Matter

of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O., Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION, Respondent.

ORDER MAKING JUDGMENT OF THE COURT OF APPEALS THE JUDGMENT OF SUPREME COURT—September 10, 1962

Petitioner having appealed to the Court of Appeals of the State of New York from the order of modification of the Appellate Division of the Supreme Court for the First Judicial Department, made herein and filed on December 14, 1961, in the office of the Clerk of said Appellate Division, and entered in the office of the Clerk of the County of New York on December 26, 1961, in so far as it modified the final order herein entered April 18, 1961, in the office of the Clerk of the County of New York by reversing that portion thereof which granted the motion to compel arbitration of National Grievance No. 2079-A and by affirming that portion thereof which denied the motion to compel arbitration of National Grievance No. 2286-G, and by denying the motion to compel arbitration of both of the aforesaid grievances; and Respondent having cross-appealed to said Court of Appeals from said order of modification in so far as it affirmed said final order granting petitioner's motion to compel respondent to submit to arbitration a controversy [fol. 165] between them known as National Appeal Grievance No. 1971-C; and after argument said Court of Appeals having made an order and judgment on July 6, 1962, affirming, without costs, said order of modification of said Appellate Division so appealed from, and ordering that the records and proceedings in said Court of Appeals be remitted to this Court to be proceeded upon according to law,

Now, upon reading and filing the remittitur of the Court of Appeals, it is

Ordered that said order and judgment of the Court of Appeals of the State of New York be, and hereby is, made the order and judgment of this Court.

Enter

S. M. G., J.S.C.

[File endorsement omitted]

[fol. 166]

THE SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 485

JAMES B. CAREY, as President of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, Respondent.

STIPULATION AND ADDITION TO RECORD—Filed May 16, 1963

To the Honorable, the Justices of the Supreme Court of the United States:

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled cause that the printed record shall consist of the following:

I The following portions of the printed record filed in the Court of Appeals of the State of New York:

Page A-1—Statement to the Court of Appeals

Page 1—Statement Under Rule 234

Pages 2 and 3—Notice of Appeal

Pages 5 through 7—Order Appealed From

Pages 8 and 9—Notice of Motion

Pages 10 through 52—The following portions of Petition of James B. Carey in Support of Motion:

Page 10 through page 18 as far as, but not including, the words "*National Appeal Grievance 2547-C*" on the eighth line from the bottom of the page.

[fol. 167] Page 24 commencing with the words *"National Appeal Grievance 2286-G"* on the 15th line from the bottom of the page through page 27.

Page 30 commencing with paragraph numbered 27 through page 31.

Page 40 through page 45—Exhibits 5, 6, and 7.

From page 53 to page 57,—The following portions of Answer to Petition:

Page 53 as far as, but not including, paragraph numbered 2.

Page 54 commencing with paragraph numbered 6 through page 55 as far as, but not including, paragraph numbered 9.

Page 56 paragraphs 11 and 12.

Page 56 commencing with *"Respondent for an affirmative defense"*, appears on the second line from the bottom of the page, through page 57.

Page 58 through page 64—Affidavit of Clark Frame

Page 65 through page 76—Affidavit of K. H. Smith

From page 93 to page 108—The following portions of Reply Affidavit of Ellis Hockenberry:

Page 93 through page 95 to, but not including, the words "It refers to the grievance in the Metuchen" which appear on the seventh line from the bottom of its page.

Page 103 commencing with "When we turn to the grievance", which appears on the fifteenth line from the bottom of the page, through page 108.

Page 111 through page 115—Sur-Reply Affidavit of K. H. Smith and Exhibit A attached thereto.

Page 116 through page 127—Opinion of McGivern, J.

Page 128 through page 129—Stipulation as to Exhibit.

Page 130—Stipulation Waiving Certification.

Page 131 through page 132—Notice of Appeal to the Court of Appeals.

[fol. 168] Page 134 through page 135—Order of Modification Appealed From.

Page 136 through page 144—Opinion of Appellate Division

Page 145 through page 148—Opinion of Eager, J.

Page 149—Stipulation Dispensing with Printing of Exhibit.

Page 150—Stipulation Waiving Security.

Page 151—Stipulation Waiving Certification of Record.

II Opinions and order of the Court of Appeals

III Remittitur to the Supreme Court of the State of New York.

IV Order on Remittitur entered September 10, 1962.

V It Is Further Stipulated And Agreed that the Agreement between Westinghouse Electric Corporation and International Union of Electrical, Radio and Machine Workers, a copy of which is attached hereto and which has been treated as part of the record in the courts below (see pp. 128, 149 of the printed record below), is to be considered as part of the record filed with the Supreme Court. Forty copies of this agreement will be submitted to be bound with the printed record.

VI It Is Further Stipulated And Agreed that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

David S. Davidson, Counsel for Petitioner;

John F. Hunt, Jr., Counsel for Respondent.

[fol. 169]

AGREEMENT BETWEEN WESTINGHOUSE ELECTRIC CORPORATION AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (A.F.L.-C.I.O.)

(See Opposite)

AGREEMENT

between

WESTINGHOUSE ELECTRIC CORPORATION

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (A.F.L.-C.I.O.)

EFFECTIVE
OCTOBER 1, 1960

AS MODIFIED BY

SUPPLEMENT I DATED OCTOBER 1, 1960
SUPPLEMENT II DATED JUNE 1, 1961
SUPPLEMENT III DATED DECEMBER 21, 1961
SUPPLEMENT IV DATED SEPTEMBER 24, 1962
SUPPLEMENT V DATED JUNE 30, 1963
SUPPLEMENT VI DATED SEPTEMBER 18, 1964
SUPPLEMENT VII DATED MARCH 29, 1965

TABLE OF CONTENTS

Section		Page No.
	INTRODUCTION	1
I.	RECOGNITION	1
II.	COMMITTEE	2
III.	CONSIDERATION AND COOPERATION	2
IV.	DISCRIMINATION-MANAGEMENT	3
V.	DISCRIMINATION-UNION	3
VI.	STRIKES, STOPPAGES AND LOCK-OUTS	4
VI-A.	UNION SHOP	5-9
	A. Effective Date, Period Covered, Notification to Employes	5
	B. Employes Who Are Union Members	6
	C. Employes Who Are Not Union Members	7
	D. Hires, Rehires and Transferred Employes	7
	E. Withdrawal Period	7
	F. Procedure for Termination of Employment	8
	G. Definitions	8
	H. Technical and Professional Employes	9
	I. State Laws	9
VII.	CHECKOFF	10-13
	1. Dues Deduction Authorizations	10
	2. Starting Deductions	11
	3. Delinquencies	11
	4. Adjustment of Errors	11
	5. Reinstatements	12
	6. Transfers	12
	7. Contact with the Union	12
	8. Report and Remittances to Union	13
VIII.	WAGES	13-23
	1. Women on Men's Jobs	14
	2. Payroll Administration	14
	3. Night Turn Adjustment	14
	4. Four Hours of Work	14
	5. Groups and Group Leaders' Remuneration	14
	6. Salary Schedules; Hourly and Salary Reviews	15
	7. Information	16
	8. Time Values and General Wage Procedures for Incentive Operations	17
	9. Daywork and Salary Operations	20
	10. Changes in Wage Payment Plans	22
	11. Leave-Death in Immediate Family	23

TABLE OF CONTENTS (continued)

Section		Page No.
IX.	HOURS OF WORK	24
X.	OVERTIME	24-26
	1. Hourly	24
	2. Salary	25
XI.	HOLIDAYS AND VACATIONS	26-30
	1. Holidays	26
	2. Vacations	27
	A. Hourly Employes	28
	B. Salaried Employes	29
XII.	SENIORITY	30-36
	A. General	30
	B. Seniority Credit	31
	C. Active Seniority List	31
	D. Inactive Seniority List	31
	E. Return of Employes to Bargaining Units.	32
	F. Decrease in Working Force	32
	G. Increase in Working Force—Transfers and Upgrading	33
	H. Notice Period	33
	I. Work Assignments—Graduate Student Training Course	34
	J. Seniority Preference	34
	K. Details and Procedures	36
XIII.	LEAVE OF ABSENCE	36
XIV.	SETTLEMENT OF DISPUTES	37-40
	A. Local Grievance Procedure	37
	B. General Provisions and Appeal Grievance Procedure	39
XIV-A.	ARBITRATION	41-45
XV.	BULLETIN BOARDS	45
XVI.	JURY DUTY	45
XVII.	MILITARY SERVICE	45
XVIII.	MODIFICATION	46-51
XIV.	TERMINATION	51
	SUPPLEMENT I	53
	SUPPLEMENT II	56
	SUPPLEMENT III	59
	SUPPLEMENT IV	63
	SUPPLEMENT V	69
	SUPPLEMENT VI	73
	SUPPLEMENT VII	77
	APPENDIX	90-107

AGREEMENT

Between

WESTINGHOUSE ELECTRIC CORPORATION

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O.

AS MODIFIED BY

SUPPLEMENT I DATED OCTOBER 1, 1950
SUPPLEMENT II DATED JUNE 1, 1951
SUPPLEMENT III DATED DECEMBER 21, 1951
SUPPLEMENT IV DATED SEPTEMBER 25, 1952
SUPPLEMENT V DATED JUNE 30, 1953
SUPPLEMENT VI DATED SEPTEMBER 10, 1954
SUPPLEMENT VII DATED MARCH 20, 1956

INTRODUCTION

AGREEMENT, entered into as of the 1st day of October, 1950 between WESTINGHOUSE ELECTRIC CORPORATION, hereinafter referred to as the "Company," and the INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O., hereinafter referred to as the "Union," acting for itself and on behalf of and in conjunction with its various Locals hereinafter specified, which are hereinafter referred to as the "Locals."

SECTION I—RECOGNITION

1. The Company agrees to recognize the Union, on behalf of and in conjunction with its Locals, for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been

lawfully designated as the exclusive bargaining representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. The units and Locals referred to in the preceding sentence are set forth in the Appendix attached hereto and made a part of this Agreement.

2. Any units for which the Union or any of its Locals shall be lawfully certified by the National Labor Relations Board as exclusive bargaining representative, shall, upon assent in writing to this Agreement by such representative, be included in and covered by this Agreement as of the date of certification, except that either party may withhold the application of those portions of this Agreement considered inapplicable to such units by giving written notice to the other party within thirty (30) days of such representative's assent.

SECTION II—COMMITTEE

The Union has designated a committee of seven (7) consisting of at least one International Officer of the Union and representatives of its Locals, and the Company has designated a committee of seven (7) as its representatives, for the purpose of considering, pursuant to the provisions of this Agreement, all matters relating thereto which said representatives of the Union and the Company, respectively, may deem Company-wide and generally applicable to the various certified collective bargaining units. Either party may, at any time, change said representatives, provided that neither party will be represented by more than seven (7) representatives at any one time.

SECTION III—CONSIDERATION AND COOPERATION

This Agreement is entered into in consideration of the mutual performance thereof in good faith by both parties.

The intention of this Agreement is to establish harmonious relations between the Company and the Union and its membership and to promote the general welfare of the Company and the employes. The parties to this Agreement agree to cooperate in every reasonable way in carrying out the provisions hereof and to exchange such information with respect hereto as is mutually deemed essential for the furtherance of harmonious relations. The Union recognizes that it is the responsibility of the Company and its Plant Managements to maintain plant efficiency and agrees that Management shall have the freedom of action necessary to discharge its responsibility for the successful operation of the Company. This responsibility includes, among other things, the determination of the number and location of its plants; the selection of those with whom it will do business; and the determination of the products to be manufactured and the production schedules. This section does not limit or modify the rights of the parties under any other provisions of this Agreement or of the applicable local supp[illegible].

SECTION IV—DISCRIMINATION—MANAGEMENT

There will be no discrimination by supervisory or other employes of the Company not included in the units covered by this Agreement, against any employe because of membership or activities in the Union.

SECTION V—DISCRIMINATION—UNION

The Union agrees that neither it, nor its Locals, nor their respective officers and members, nor persons employed directly or indirectly by the Union or its Locals, will discriminate against any employe. The Union further agrees that there will be no solicitation of members, dues, or funds during the working hours of employes involved.

SECTION VI—STRIKES, STOPPAGES, AND LOCKOUTS

A. Subject to the provisions of Section XVIII hereof, the Union and the Locals will not cause or officially sanction their members to cause or take part in any strike (including sit-downs, stay-ins, slow-downs, or any other stoppage of work) during the life of this Agreement. This includes disputes which are within the proper scope of the grievance procedure provided in this Agreement or the applicable local supplement (a) until such grievance procedure has been fully exhausted, and (b) thereafter except as provided in Paragraph B below. The Company will not lock out any employe, nor will the Company transfer work from any job because of a dispute which is within the proper scope of the grievance procedure provided herein, until such grievance procedure has been fully exhausted.

B. When the grievance procedure has been exhausted as provided for in Section XIV, the Union headquarters may authorize a strike of the employes in a bargaining unit in support of a grievance involving such bargaining unit. Such a strike, when so authorized, shall not be a violation of this Section if all of the following conditions are satisfied: (a) if written notice that Management's reply at the national appeal level is unsatisfactory (Paragraph B3, Section XIV) has been given, (b) if the grievance is not subject to arbitration under Section XIV-A, and (c) if written notice of the Union's authorization to the Local to strike has been given to the Company not less than three (3) days prior to the strike. When the Company has questioned the arbitrability of a grievance under Section XIV-A subparagraph C. 5., the Local shall have the right to strike in support of such grievance, after satisfying condition (c) of this paragraph.

SECTION VI-A—UNION SHOP

A. Effective Date, Period Covered, Notification to Employes

1. This Section shall become effective immediately with respect to each unit covered as of June 1, 1951, by a certificate of the National Labor Relations Board, pursuant to Section 9 (e) (1) of the National Labor Relations Act, that at least a majority of the employes in such unit have voted to authorize the Union or a Local of the Union to make an agreement with the Company requiring membership therein as a condition of employment. The units referred to in the preceding sentence are listed in Appendix B which is attached hereto and made a part hereof.

2. At any time during the life of this Agreement, a Local may submit to local Management a petition signed by a majority of the eligible employes in any bargaining unit represented by it and covered by this Agreement which is not listed in Appendix B, requesting that the Union Shop provisions of this Section VI-A be extended to such bargaining unit. The form of such petition shall be, "We hereby request that the Union Shop provisions of Section VI-A of the National Agreement between Westinghouse and the IUE-AFL-CIO be extended to the bargaining unit of ..... employes at the ..... plant." The employes in the bargaining unit on the active roll during the last complete payroll period ending prior to the submission of the petition shall be the employes considered in determining eligibility and majority under these provisions.

3. Unless Management advises the Local in writing within ten working days after it receives such petition that it questions the number or authenticity of the signatures, this Section VI-A shall become effective with respect to such bargaining unit on the eleventh working day after such receipt, provided that the Union and the Local involved have, during the preceding twelve (12) months, received from the National Labor Relations Board a

notice of compliance with Sections 9 (f), (g) and (h) of the National Labor Relations Act (the presentation of the petition shall constitute a certification that such is the fact), and further provided that no certification of rescission of authority to enter into a union security agreement covering such bargaining unit, or any part thereof, shall have been issued by the Board during such twelve (12) months period pursuant to Section 8 (a) (3) of such Act. If Management raises a question concerning the number or authenticity of the signatures during the ten working days period, representatives of local Management and the Local will meet promptly to discuss the matter. If the matter is not settled locally by mutual agreement within ten working days after the question is raised, it may be presented by either party as a national appeal level grievance.

4. The Company shall, for a reasonable time, post a bulletin board notice quoting the provisions of this Section for the information of affected employes.

B. Employes Who Are Union Members

1. Every employe who on June 1, 1951 is in a unit listed in Appendix B and who is a member of the Union on or after July 2, 1951, shall, as a condition of employment, maintain his membership in the Union.

2. Every employe who is in a unit other than those listed in Appendix B on the date this Section becomes effective with respect to such unit and who is a member of the Union on or after the thirty-first (31st) day after such effective date shall, as a condition of employment, maintain his membership in the Union.

3. No employe shall be considered a member of the Union on the date after which he is required to maintain his Union membership under Paragraphs 1 or 2 above if he notifies the Company and the Union or the Local in writing prior to such date that he wishes to terminate his membership.

C. Employes Who Are Not Union Members

1. Any employe in a unit listed in Appendix B who is not a member of the Union on July 2, 1951, and any employe in any other unit who is not a member of the Union on the thirty-first (31st) day after the date this Section becomes effective with respect to the unit in which he is employed, shall not be required to become a member of the Union as a condition of continued employment. Any such employe who thereafter becomes a member of the Union shall, however, maintain his membership as a condition of employment thereafter.

D. Hires, Rehires and Transferred Employes

1. Every person who is first hired on a job in a unit after this Section has become effective with respect to such unit shall, as a condition of continued employment, be a member of the Union on and after the forty-fifth (45th) day after the date of his hire, and shall thereafter maintain his membership in the Union.

2. Any employe who is transferred to a job in a unit covered by this Section (whether or not the job from which the employe is transferred is in a unit covered by this Section), and any former employe who is rehired on a job in a unit covered by this Section, shall be governed by the provisions of Paragraph D.1. above, with their date of transfer or rehire being considered equivalent to the date of hire referred to in such Paragraph D.1.

E. Withdrawal Period

Notwithstanding any other provisions of this Section, every employe who is otherwise required under this Section to obtain and/or maintain membership in the Union shall have the right, after having obtained such membership, to resign from the Union by giving written notice thereof to the Company and to the Union or the Local during the period from June 4 to June 11, inclusive, of each year (such period is hereafter referred to as the "withdrawal period"). Such notice shall be deemed to have been properly given if it is postmarked, or is re-

ceived by the Company and the Union or the Local, during the withdrawal period. Any employe who resigns from the Union during a withdrawal period shall not thereafter be obligated to obtain or maintain membership in the Union unless he shall thereafter, during the life of this Agreement, again become a member of the Union, in which case he shall maintain his membership as a condition of employment thereafter, subject to his right to resign during any subsequent withdrawal period as provided in this Paragraph E.

F. Procedure for Termination of Employment

1. The Company shall be obligated under this Section to terminate the employment of any employe by reason of his failure to obtain or to maintain membership in the Union as required by this Section upon receipt of written request for such termination from the Union; except that the Company shall have the right to refuse such request if it has reasonable grounds for believing (i) that such membership is not available to the employe on the same terms and conditions generally applicable to other members, or (ii) that membership has been denied or terminated for reasons other than the failure of the employe to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

2. The Union agrees to indemnify and save harmless the Company from any payment the Company may be required to make in favor of any employe whose employment is terminated pursuant to any such request.

G. Definitions

For the purpose of this Section:

(a) The term "employe" means any person on the active payroll or the disability payroll of the Company or on leave of absence from the Company, except employes of the type referred to in Paragraph H. It does not include persons who have been laid off, whether or not they are on any seniority list, and such persons shall, when recalled

to work, be considered as newly hired employes. (see Paragraph D.1.)

(b) The term "initiation fee" means such amount as may be uniformly charged by the appropriate Local as a condition of granting membership in such Local and in the Union; providing, however, that no amount in excess of $10.00 shall be considered as an initiation fee for purposes of this Section.

(c) The term "dues" shall not be deemed to include any fine, assessment, contribution, tax or other form of payment required from Union members except the payment required in equal amounts from every member once during each month.

H. Technical and Professional Employes

This Section shall not apply to any technical or professional employes, including but not limited to engineers; salesmen (inside or outside) or sales assistants; negotiation correspondents; methods engineers or time study men; technical or creative writers; staff assistants or staff specialists reporting to department managers; laboratory technicians; buyers; internal auditors or budget accountants; and nurses.

I. State Laws

This Section shall not apply to employes employed in any state during any period (i) while the laws of such state provide, in substance, that it is illegal or against public policy to make union membership a condition of employment, or (ii) while such laws impose restrictions upon the making of union security agreements which have not been fully complied with.

SECTION VII—CHECKOFF

1. Dues Deduction Authorizations

a. For the duration of the Agreement, the Company shall deduct from the first pay of each month Union dues and promptly remit same to the respective Locals of the Union, for those employes in the bargaining units whose written and signed authorizations (on the following form), with all blank spaces properly filled in, are received by the Company.

Name (Print).....

(First) (Middle Initial) (Last)

Effective Date.....Social Security No.....

TO WESTINGHOUSE ELECTRIC CORPORATION

Please deduct $..... from my pay each month and remit same to Local..... International Union of Electrical, Radio & Machine Workers, A.F.L.-C.I.O., in accordance with this authorization and assignment, in payment of the monthly membership dues of such Local. In addition, please deduct my initiation fee $..... as part of the first month's deduction of membership dues and remit same to said Local.

This assignment and authorization shall be irrevocable, except that it may be revoked by my giving written notice to you by individual registered mail postmarked, or received by the Company, either (a) during a period from the first June 4 to the first June 11, both inclusive, after the effective date of this authorization, (b) during the same period of each year thereafter, or (c) after the termination date of the National Agreement (dated July 14, 1950) between Westinghouse Electric Corporation and the International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O. This assignment and authorization supersedes all authorizations and assignments previously signed by me with respect to union dues and/or initiation fees.

....

Section Check No. Employe's Signature

I.U.E. DEDUCTION AUTHORIZATION

b. The date in parenthesis in clause (c) of the form may be changed to read "(dated October 1, 1950)".

c. On or before June 18 of each year, local Management will furnish the Local with a list of employes who have revoked their deduction authorization during the preceding revocation period of June 4 to June 11.

2. Starting Deductions

a. Deductions for employes whose authorizations are received after the effective date of this Agreement will be commenced with the first month starting after receipt of the respective authorizations. The date of receipt will be recorded on the authorization by the Company, and such record shall be conclusive on all parties concerned. For weekly payrolls, all authorizations received by the last Friday in the calendar month will be included in the deduction for the following month. For monthly payrolls, all authorizations received by the last working day of the calendar month will be included in the deductions for the following month.

b. Deduction will be made from the first pay of the month in the case of weekly payrolls and from the end-of-month pay in the case of monthly payrolls. Collection of any back dues owed at the time of starting deduction for any employe will be the responsibility of the Union and will not be the subject of payroll deduction.

3. Delinquencies

Dues unpaid because the employe was not working during the first pay period of the month will be deducted from the first pay period worked in that month. If an employe does not work at any time during the month, dues for the month not worked will not be deducted by the Company from pay in any subsequent month.

4. Adjustment of Errors

Except where the Company has made a clerical error in the deduction for dues which will be adjusted promptly

by the Company, any question as to the correctness of the amount deducted shall be settled between the employe and the Local; and the Union shall indemnify the Company and save it harmless against any and all suits, claims, demands and liabilities that shall arise out of or by reason of any action that shall be taken by the Company for the purpose of complying with the provisions of this Section VII or in reliance on any authorization form or information furnished to the Company under such provisions.

5. Reinstatements

Employes who return to the active payroll from sickness or leave of absence shall have dues deductions automatically reinstated upon return to work, providing their individual written and signed authorizations for the deduction of such amounts are still in effect. When an employe is rehired in the same bargaining unit after layoff, his deduction authorization (if in effect at time of separation) shall be reinstated only if he signs a request for continuation of such deductions on the reverse side of the card.

6. Transfers

When employes are transferred from a bargaining unit represented by one Local to a bargaining unit represented by a different Local, deduction of dues will be discontinued at the place from which the transfer is made, and will be resumed at the point to which the transfer is made only after receipt of new written and signed authorizations. Deductions will also be automatically discontinued when an employe is transferred to work outside of any bargaining unit covered by this Agreement; except that where the transfer is to a newly created position at the same location which the Local considers to be a part of an existing bargaining unit the deductions will be continued until a determination has been made as to whether or not the new position is in the bargaining unit.

7. Contact with the Union

One employe in the Accounting Department at each

payroll source will be designated to confer with an individual designated by the Local and clear all questions regarding the detail of record and reconciliation of deduction of dues.

8. Report and Remittances to Union

a. Within fifteen days after the last pay day for the first pay period in the month, a check for the total deductions made in that pay period shall be sent to the Local with substantiating list attached. In the case of weekly payrolls, the remittance will include dues deducted from pay periods after the first week of the previous month from employes who were not working in the first pay period.

b. Each list of deductions sent to the Locals shall show for all employes on the active roll from whom deductions have been made (1) name, (2) shop location, (3) Social Security Number, (4) amount of the deduction from each individual employe, and (5) reason for non-deduction if known.

c. Attached to the list accompanying remittance to the Local will be a summary indicating the total amount deducted and the number of employes from whom dues deductions were made.

d. A summarization of local remittance summaries will be forwarded on or about the 20th of the following month to the International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O., 1126 Sixteenth Street, N.W., Washington 6, D.C.

SECTION VIII—WAGES

Wages will be paid in accordance with wage schedules effective in the various bargaining units. All wage schedules are negotiated locally. The following provisions affecting wages are applicable to all units.

1. Women on Men's Jobs

Women placed on jobs classified by the Company as men's jobs shall receive men's rates of pay.

2. Payroll Administration

The accumulation of unreported time on completed work beyond the current pay period is not permitted except as has been, or may be, provided for in local supplements.

3. Night Turn Adjustment

Employes working night turn will receive an extra compensation of 10% of that portion of their earnings on night turn resulting from payment of their guaranteed rate minus 18 cents per hour when the regular quitting time is after nine o'clock in the evening (9:00 P.M.) and up to and including nine o'clock (9:00 A.M.) of the following day.

4. Four Hours of Work

Hourly employes who report to work at the regular starting time of their shift and have not been advised at least ten (10) hours beforehand not to report, and those who report to work at other times at Management's request, will be guaranteed four (4) hours work at their guaranteed rate or the rate of pay for the job on which they work, whichever is higher. If work is not provided during some or all of such four (4) hours, the employe will be paid at his daywork rate for such period. If the employe has qualified for overtime in accordance with the overtime provisions of this Agreement, overtime rates based on the provisions of this Agreement (Section X—Overtime) will be paid for hours not worked.

NOTE: The foregoing provisions will not apply in the case of an emergency such as fire, flood, power failure, or work stoppage by employes in the plant.

5. Groups and Group Leaders' Remuneration

a. (1) A group leader is a non-supervisory employe who

is a working member of a group, without disciplinary authority, who works under a minimum of supervision, who regularly leads, instructs, and guides employes in the group.

(2) Group leading is in addition to an employe's regular assigned job, and the deciding factor in their selection will be that the senior employe who has the ability to organize and direct a group will be selected.

b. Hourly

The remuneration for hourly group leaders depends for the most part on the work performed and the size of the group. Additional compensation paid for hourly group leaders is based on schedules negotiated locally.

c. Salary

(1) Appropriate groups for salary employes based on securing better operations will be determined locally by Management and will be a subject for negotiation before they are established.

(2) Duties of a group leader will not be assigned to an employe where less than three (3) employes are involved. No group of more than twenty (20) exclusive of the leader will be formed. Additional compensation for group leaders will be based on the following schedule:

SCHEDULE

Size of Group, exclusive of the leader	Addition to Base Rate
2 to 5	5%
6 to 10	7.5%
11 to 20	10%

6. Salary Schedules; Hourly and Salary Reviews

a. Salaries will be paid according to a local schedule effective in each bargaining unit.

b. Salary reviews will be held semi-annually to assure administration of wage policies, except that due to existing circumstances, the Local and local Management

by mutual agreement may either change or omit the scheduled review.

c. The employe's capacity to handle the range of work of his position classification, and the quality and quantity of work being performed, are the factors which determine the granting of increases.

d. Salaried employes whose work is satisfactory will receive not less than 10% above the minimum of the rate range not later than the first of the seventh month after employment.

e. Other salary increases within a rate range will be based on work performance. An employe transferred to a higher class position, whose work performance justifies it, will receive, not later than the first of the seventh month after transfer, an increase to at least 10% above the minimum rate of the new position. An employe whose rate before transfer is above the minimum of the new classification and whose work performance justifies it will receive an increase within the rate range not later than the first of the seventh month after transfer. Where the employe is known to be qualified and the transfer is to another position in the same occupational line of work in the department, the increase will be granted at the time of transfer.

f. All changes for any reason in an employe's position or rate after hiring, except separation, will be effective the first of a payroll period.

g. The procedure for hourly and salary reviews will be covered in local supplements.

7. Information

a. That portion of Company instructions contained in the Company's Industrial Relations and Accounting Manual (Part 6) which covers (a) government orders and laws affecting employes and dealing with wages, hours, and working conditions, or government interpretations of such orders and laws, or (b) instructions

on interpretations of this Agreement, will, upon issuance by the Company, be sent to the Locals and the Union.

b. Local Plant Management shall furnish the Local involved with (a) copies of all general interpretations by local Management of the information furnished under Paragraph a. above, and (b) general interpretations of the local supplements.

c. Each Local will be furnished a schedule of rates or keysheets, applying to the employes in the bargaining unit. Each Local will be furnished periodically, as established locally, a record of transfers, hires, rehires, and releases. Job descriptions will be made available, upon request, for examination by Local representatives and new or revised job descriptions established on or after October 1, 1952, including the classifications by labor grade or rate range of the job, will be furnished to the Local Union office.

8. Time Values and General Wage Procedures for Incentive Operations

A. (1) The Westinghouse incentive systems afford an opportunity for extra earnings for extra effort and guarantee only the incentive guaranteed rate. The establishing of methods of manufacture, equipment to be used, and processes to be followed and the administration of the incentive systems will be Management's responsibility. This includes the establishing of time values for wage-payment purposes by the following methods: by time study, from formula or data, by comparison, or by estimate.

(2) The foregoing methods will be used for the purpose of establishing recorded or temporary time values on new work or for revising time values on changed work. Management agrees to correct immediately any time values which are questioned and found to be in error.

B. Operations on Which No Time Values are Established.

(1) When Management assigns an incentive operator

temporarily to a job, on which no time values are established, other than his regular job, to use his skill and ability or for Management's convenience, when his regular work is available he will be paid his average earned rate as determined locally or the rate of the job, whichever is higher.

(2) The elapsed daywork hours that normally go through the incentive group resulting from a daywork job will be paid on the basis of the daywork rate. The same practice will apply to an individual incentive operator. Any dispute growing out of the amount or type of daywork assigned to incentive groups will be handled in accordance with local procedure.

C. The policy concerning temporary assignments of incentive or day workers to jobs other than their regular jobs where conditions are other than those covered in paragraph B (1), and the payment policy for such cases, will be a matter of local negotiations.

D. Operations on Which Temporary Values are Established

Time values are temporary when all or portions of the value are estimated or derived from data or information not specifically developed for the operations for which the value is determined. Temporary values will not be established for operations time studied in detail. Temporary time values will be established as soon as possible, consistent with conditions locally. Temporary time values will become recorded values not later than six (6) months from the date the item repeats on a new manufacturing order. However, where the manufacturing problems become stabilized in a shorter interval, the period for establishing the recorded value will be determined locally. If the original order is for a large quantity and the delivery schedule covers a considerable period, the period for establishing the recorded value will be determined locally. Orders for samples built on engineering or shop development and

sales distributor's sample orders are not considered to be new manufacturing orders.

E. Recorded time values (as differentiated from temporary time values) will be changed only for the following reasons:

(1) When a clerical error has been made in the determination of the time value.

(2) (a) When there is a change in the method of manufacture, tools, material, design, production conditions or servicing conditions that affects the time value, only that portion of the value affected by the change will be adjusted. Sufficient additional elements to those affected by the change may be time studied to determine the effect of the change on the existing time value.

(b) When a change is to be made in an operation, the time value for which is not broken down into elements, a time study may be taken before the change is made in order to establish the elements of the existing time value; but the time value will not be changed as a result of this study. When the change in the operation is made the provisions of sub-section (2) (a) of this paragraph will apply.

(c) Management recognizes that time values should be revised as soon as possible after the changes have been completed.

F. Surveys, including time measurements, but not time studies, may be made to plan for production improvements. These surveys shall not include time studies on individual operations. The results of such surveys will not be used to establish time values for wage-payment purposes. Management will inform the appropriate Local representative in advance of the purpose of such studies.

G. Cameras will not be used to determine or establish time values. When Management desires to use cameras for other purposes, the reason will be discussed with the Local representative in advance.

H. Payment for all elapsed hours not covered by other sections of this agreement (such as visiting Medical and Employment Departments and waiting time) will be at the employe's guaranteed rate. Employes assigned to work on inventory will be paid in accordance with subparagraph B (1).

I. Any questions that arise concerning time values and general wage procedures will be handled in accordance with the established local grievance procedure.

9. Daywork and Salary Operations

A. The principle of a fair day's work for a fair day's pay is recognized by the Union, the Locals, the employes and the Company. Where production standards are established, they will be in line with the foregoing principle and will be based on established methods, remaining on the job for the normal periods during the entire shift, subject to all customary allowance time, and the application of effort equivalent to the normal and reasonable capacity of normal operators working on the job under the prevailing conditions. In grievance and arbitration proceedings resulting from claims that any such production standard is unreasonable or unsound, the principles and yardsticks set forth in this paragraph will be controlling.

B. Surveys and time studies may be made for measuring or improving production, methods analysis or for budget purposes. The Company may apply individual production standards only to direct dayworkers. Direct dayworkers are those engaged directly in the making or building of a product of a factory department or section, together with such others as may be agreed upon in local supplements. All other dayworkers in a plant are indirect workers.

C. Management agrees to keep the appropriate local union representatives informed in advance, so

far as possible, of the programming and purpose of such studies.

D. Changes to be made, as the result of a time study, in job classifications or in the classification of individual employes (other than changes due to normal operation of the seniority procedure) will be discussed with the appropriate local union representative before they are made effective. If a grievance is filed protesting any such change, it shall be subject to arbitration; and the arbitrator may determine the proper classification of the job or the employe under the existing classification system in the bargaining unit. The arbitrator may also direct appropriate corrective action as of the date of the change, but in no event more than thirty (30) days prior to filing of the grievance.

E. Any grievance claiming that an individual employe has been disciplined or downgraded for failure to meet production standards established for productive daywork operations will be subject to arbitration under the provisions of Section XIV-A. The arbitrator shall not have authority to modify production standards; but in deciding whether there was just cause in a case arising under this Paragraph, he may consider whether the standard involved is proper under the fair day's work or pay principle mentioned above. If the arbitrator sustains the grievance on the ground that the standard involved is not proper, local Management will review it with the appropriate Local representative. Unless and until such standard is revised in accordance with the arbitrator's decision or is accepted by the Local, no employe shall be subject to discipline or downgrading for failure to meet such standard.

F. If any grievance is filed claiming that a production standard established for an employe's work is unreasonable, and the foreman is unable to adjust the matter, the standard will be reviewed, and re-

studied within a reasonable time if the operation is continuing, and if the standard is incorrect it will be revised. If, after such review and restudy, the employe still protests the standard, the supervisor, upon request of the steward, will review with the steward the facts of the case, including the time study, review or restudy, or other basis for the standard. If the matter is not adjusted, the steward may, together with one other union representative, observe the operations to determine whether the standard conforms with the guides and principles of Paragraph 9 A. above. If there is still a question concerning such standard the question may be handled in accordance with the grievance and arbitration procedures, leading to final and binding decision in arbitration. The parties will consider and seek to agree upon a single skilled arbitrator with industrial engineering training and experience to handle all production standards cases, and if they are unable to do so within sixty (60) days from the date this sub-paragraph becomes effective, then upon the request of either party, upon reasonable notice to the other, a permanent standards arbitrator will be selected in accordance with the appropriate procedures of the Federal Mediation and Conciliation Service. Such selections will be made for periods of not less than twelve (12) months, and any vacancy will be filled in accordance with the foregoing procedure. The compensation and expense of such arbitrator will be divided equally between the Company and the Union.

10. Changes in Wage Payment Plans

A. When the established plan of payment of employes (daywork, individual incentive, or group incentive) is to be changed, it will be a matter of local negotations.

B. The Company agrees that it will not make any changes in the established plan of payment on a plant-wide basis, either in its entirety or in a series

of piece-meal changes, in any bargaining unit for which there is a local wage supplement in effect, except by agreement between local Management and the Local. The Company agrees as of the effective date of Supplement VII hereto immediately to enter into local wage supplements covering such units as do not on such date have local wage supplements in effect by converting the current key sheets (or the current job rates where there are no key sheets established) into wage supplements.

C. In all other situations not related to the preceding paragraph, whether or not local wage schedules have been incorporated into local wage supplements, it will be the policy of the Company and the normal practice not to change the established plan of payment of employes from incentive to daywork or from daywork to incentive except after discussion and agreement between the local Management and the Local. If in any instance a Local unreasonably withholds its consent, then after a period of negotiations of not less than two weeks, the local Management may elect to put the change into effect, but the Local will thereupon have the right to strike over this issue. The question whether consent was withheld unreasonably shall not be arbitrable.

11. Leave—Death in Immediate Family

An hourly-paid employe with three (3) months' continuous service who is absent from work solely because of the death and funeral of his or her parent, brother, sister, child or spouse will be compensated for time lost by him from his regular schedule by reason of such absence, up to a maximum of three (3) days for each such absence. Incentive employes will be compensated on the basis of their average earned rate for the calendar quarter immediately preceding such absence. Daywork employes will be compensated on the basis of their rate of record on the date of such absences.

SECTION IX—HOURS OF WORK

1. The basic work week will be forty (40) hours based on eight (8) hours per day, five (5) days per week, Monday to Friday inclusive. An employe's work day is the twenty-four hour period beginning with his regularly assigned starting time of his workshift, and his day of rest starts at the same time on the day or days he is not scheduled to work. His work week starts with his regularly assigned work period on Monday. Variations in hours of work and the schedules of hours of the several shifts are subjects for local negotiations.

2. The provision for payment of night turn adjustment (Section VIII, paragraph 2) and overtime (Section X) shall be inapplicable to employes on continuous shift operations. Such provisions for payment of night turn adjustment shall also be inapplicable to any special groups of employes who have not heretofore received extra compensation for working night turn hours; and such provisions for payment of overtime shall also be inapplicable to any special group of employes who have not heretofore received overtime pay for work on particular days as such. The local policies in effect at the date of this Agreement with respect to overtime and night turn adjustment for continuous shift operations and for such special groups will be incorporated in local supplements, with only such changes as are made by mutual agreement.

SECTION X—OVERTIME

For overtime purposes the average earned rate will consist of straight time earnings, including guaranteed rate, night turn bonus, group leader remuneration, and incentive payments. Special provisions and all exceptions to this Section X will be contained in local supplements as provided in Paragraph 2 of Section IX.

1. Hourly

Overtime payments will be made to hourly-paid employes under the following conditions:

a. Time and one-half—i.e., hourly earnings plus one-half (½) the employe's average earned rate for the payroll period involved—for:

(1) All hours worked in excess of eight (8) hours but less than twelve (12) in any day (Monday to Friday, inclusive).

(2) All hours worked less than twelve (12) on Saturday.

(3) All hours worked less than eight (8) on observed holidays for which the employe receives additional payment under Section XI.

b. Double time—i.e., hourly earnings plus the employe's average earned rate for the payroll period involved—for:

(1) All hours worked on Sundays.

(2) All hours worked on calendar Sundays outside of the employe's established shift.

(3) All hours worked after twelve (12) hours in any day (Monday to Saturday, inclusive).

(4) All hours worked on observed holidays for which the employe is not eligible for payment under Section XI.

(5) All hours worked on observed holidays after eight (8) hours for which the employe receives additional payment under Section XI.

2. Salary

a. All hours worked by salaried employes who are paid overtime on hours worked in excess of eight (8) hours in any day or forty (40) hours in any week will be paid at overtime rate, i.e., the hourly earnings plus an additional payment for each hour so worked equal to one-half the employe's average earned hourly rate for the payroll period involved.

b. Hours worked on Sundays after forty hours have been worked in the week, by salaried employes who are paid overtime on hours worked, will be paid for at the employe's hourly earnings plus an additional payment

for each hour so worked equal to the employe's average earned hourly rate.

c. Absent hours considered as excusable will be considered as hours worked for determining overtime.

d. Hours worked on observed holidays, by salaried employes who are paid overtime on hours worked, will be paid for at the employe's hourly earnings plus an additional payment for each hour so worked equal to one-half the employe's average earned hourly rate. Such payment is in addition to the employe's salary.

SECTION XI—HOLIDAYS AND VACATIONS

1. Holidays

a. Holidays observed by the Company will be New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving, and Christmas. Holidays falling on Sunday will be observed on Monday.

b. In any calendar year in which one or more of such holidays fall on Saturday, such holiday or holidays will not be an observed holiday in such year within the meaning of this Agreement, but another day or days between Monday and Friday, both inclusive, will be observed during such year in place of the Saturday holiday or holidays. Local Management at each location shall be required to designate such alternative day or days before January 1 of such calendar year after the matter has been discussed between the Local and local Management.

c. When the necessary arrangements can be made and it is satisfactory to the Local and local Management, another day may be permanently substituted for Washington's Birthday through a provision in the local supplement. When a state law requires the observance of a holiday not listed above, it shall be the holiday

substituted for Washington's Birthday, if the parties have agreed to make a substitution.

d. All hourly paid employes who have completed three (3) months' continuous service immediately preceding an observed holiday will be paid for their established shift hours on such holiday.

Hourly paid employes who were laid off for lack of work and are rehired within one (1) year after layoff, who completed three (3) months' continuous service prior to their layoff, will receive the above holiday payment.

e. Employes will be paid for such hours at their average earned rate, as defined in Section X, for the payroll period involved.

f. The above payment will be made only to hourly paid employes who are on the active roll as of the day before the observed holiday within the week and who earn some wages during the week in which such holiday falls or any of the four preceding weeks.

g. Salary employes will be paid for the seven (7) observed holidays.

2. Vacations

a. The Company will permit vacations to be taken as desired by employes as far as practical, consistent with efficient operations.

b. When the vacation period of a salaried employe includes one of the seven (7) recognized holidays in his regularly scheduled work week, or the vacation period of an hourly paid employe includes one of the seven (7) paid holidays, an additional day of vacation will be granted with pay, in lieu of the holiday.

c. Due to the nature of the operations, some locations will shut down annually for vacation purposes, and the time of year of the shutdown will be a matter for local negotiations. In such locations the vacations will run concurrently with the shut-down period. Employes

who become eligible for vacations subsequent to the annual shut-down, but before the end of the year, will be granted vacation pay, when they become eligible, if they were absent during the shut-down period, without additional time off. It is recognized that some employes will be requested to work during the shut-down period.

d. Where an employe is removed from the active roll for any reason, payment for vacation not taken for the current year will be made if the employe has qualified for vacation.

A. Hourly Employes

(1) The Company will grant vacations to hourly rated employes as follows:

(a) Over one (1) year of total employment but less than two (2) years with three (3) months' continuous employment immediately preceding the time of starting vacation—1 week.

(b) Over two (2) years' total employment but less than three (3) years with three (3) months' continuous employment immediately preceding the time of starting vacation—1 week plus 1 day.

(c) Over three (3) years' total employment but less than four (4) years with three (3) months' continuous employment immediately preceding the time of starting vacation—1 week plus 2 days.

(d) Over four (4) years' total employment but less than five (5) years with three (3) months' continuous employment immediately preceding the time of starting vacation—1 week plus 3 days.

(e) Over five (5) years' total employment with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks.

(f) Over eleven (11) years' total employment but less than twelve (12) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 1 day.*

(g)* Over twelve (12) years' total employment but less than thirteen (13) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 2 days.

(h)* Over thirteen (13) years' total employment but less than fourteen (14) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 3 days.

(i)* Over fourteen (14) years' total employment but less than fifteen (15) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 4 days.

(j) Over fifteen (15) years' total employment with three (3) months' continuous employment immediately preceding the time of starting vacation—3 weeks.

******Effective January 1, 1956***

(2) Vacations will be paid at the average earned rate of the hourly rated employe during the last complete accounting quarter-year prior to the vacation involved; however, the average earned rate for a particular quarter shall be continued in use for payments applicable to the first two weekly pay periods of the second accounting quarter following. The average earned rate for vacation purposes will consist of straight time earnings, including guaranteed rate, night turn bonus, group leader remuneration, and incentive payments. Vacation hours will be based upon the number of hours regularly scheduled in the basic work week, Monday to Friday inclusive.

B. Salaried Employes

(1) The Company will grant vacations to salaried employes as follows:

(a) Over one (1) year, but less than eleven (11) years of total employment with three (3) months continuous employment immediately preceding the time of starting vacation—2 weeks.*

(b) Over eleven (11) years' total employment but less than twelve (12) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 1 day.*

(c) Over twelve (12) years' total employment but less than thirteen (13) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 2 days.*

(d) Over thirteen (13) years' total employment but less than fourteen (14) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 3 days.*

(e) Over fourteen (14) years' total employment but less than fifteen (15) years with three (3) months' continuous employment immediately preceding the time of starting vacation—2 weeks plus 4 days.*

(f) Over fifteen (15) years' total employment with three (3) months' continuous employment immediately preceding the time of starting vacation—3 weeks.

**Effective January 1, 1956*

(2) Payment will be made at the recorded salary rate of such employes, plus night turn bonus, group leader remuneration, and incentive payments, if any.

SECTION XII—SENIORITY

A. In all cases of rehiring or lay-offs due to increasing or decreasing forces, accumulated length of service will

govern if the employe can do the job with only such training as an employe with previous experience on such job would require.

B. Seniority Credit

1. An employe on leave of absence is not on the active roll, but will accumulate service during leave of absence. An employe on furlough is on the active roll and will accumulate service while on furlough. An employe laid off is not on the active roll and will not accumulate service while laid off, but will receive credit for former service when rehired.

2. The extent of notice to be given to newly hired hourly and salaried employes during their probationary period, if their services are unsatisfactory, and the length of such period, shall be embodied in the local supplements.

C. Active Seniority List

1. The composition of seniority units will be negotiated locally and embodied in local supplements.

2. An Active Seniority List will be made up for each seniority unit on the basis of accumulated length of service.

3. The procedure governing the decreasing or increasing of the working force within the seniority units established under the provisions of sub-section one (1) above are contained in paragraphs F and G below.

D. Inactive Seniority List

1. The names of those laid off will be placed on the Inactive Seniority List.

2. The names of employes who voluntarily quit, who are released, or who are discharged will not be placed on the Inactive Seniority List.

3. The names of employes will be removed from the Inactive Seniority List in line with provisions of the local supplements as negotiated locally.

4. The manner in which employes will be called back to work and the method of notification will be negotiated locally and included in the local supplements.

E. Return of Employes to Bargaining Units

1. The Locals will not oppose the return of supervisory employes to a bargaining unit provided that at the time of promotion they worked on a job which is in the bargaining unit at the time of such return. Seniority credit of such employes will include the period the employe spent as a supervisor. The employe will be returned to a job, if any, in the bargaining unit to which his seniority entitles him.

2. The question of whether or not non-supervisory employes may return to the bargaining unit is a matter for local negotiation.

F. Decrease in Working Force

1. It is mutually recognized that to operate a plant, or any part thereof, at a schedule that gives employes less than a full week of work is unsatisfactory to both the employes and the Company. Temporary reductions in production will be bridged by furloughing of employes in accordance with local procedure. When there is a definite reduction in the production schedule for a group or section, employes will be laid off to maintain a full work week. The parties may negotiate at any time temporary modifications of this procedure and the periods of time during which they will be in effect.

2. It is understood and agreed that in all cases of layoffs due to decreasing forces, accumulated length of service will govern, and employes will be permitted to displace other employes only if the employe can perform the duties of the job with only such training as an employe with previous experience on such job would require.

3. Locals which have heretofore recognized the principle that there shall be a differential in accumulated length of service required before one employe can displace another will continue to do so and negotiate the amount of differential for inclusion in local supplements. Other Locals may recognize the principle and negotiate the matter with local Management.

4. At the time of layoff, an employe on personal leave of absence or on the disability roll will be laid off and his name will be added to the Inactive Seniority List when, because of his seniority status under the established seniority procedure, he would have been laid off if he were actively at work. Notice of such layoffs will be given to the Local and to the employe involved at his last known address, but the usual notice periods outlined below in Paragraph H shall not apply. Any objection to such layoff must be made by filing a grievance within two (2) weeks following the giving of such notice to the Local. Layoff pursuant to this provision shall not affect any right to benefits or coverage under the Social Insurance Plan to which the employe has already become entitled prior to the layoff, either for himself or his dependents, by reason of his disability or leave of absence.

G. Increase in Working Force—Transfers and Upgrading

In all cases of transfers and upgrading to fill open jobs, accumulated length of service will govern if the employe's experience, although not necessarily on the same type of work, indicates that he can do the job. The filling of open jobs from the Inactive Seniority List will follow the provisions contained in local supplements provided the employe can do the job with only such training as an employe with previous experience on such job would require.

H. Notice Period

1. Employes released, or selected for lay-off because of

lack of work, shall be advised of the reasons therefor at least three working days before such release or lay-off becomes effective. The steward shall be so notified before the notice is given to the employe involved. Such employes will be given three days' work, or pay if work is not provided.

2. The provision in the last preceding paragraph does not apply in case of discharge due to a serious infraction of Company rules. The steward and the Local's office will be notified with the reasons therefor within one working day.

3. In cases where conditions require furloughing of employes, the steward will receive reasonable advance notice in accordance with conditions as they arise, before the employes involved are notified. The employe will be given as much advance notice as practical.

I. Work Assignments—Graduate Student Training Course

It is recognized that practical work experience is necessary for the proper training of Graduate Students; therefore, work assignments will be made in line with the following provisions:

1. During such assignment the student will not replace a regular employe. His time will be charged to the Educational Department and not to the group in which he is working. He will not be subject to the seniority provisions of this agreement or the local supplements.

2. If working in an incentive group, the allowed hours of work produced by the student will be credited to the group.

3. Each assignment will not exceed six (6) weeks.

J. Seniority Preference

1. At the written request of the Local, an elected shop steward will be given seniority preference at the time when lay-offs take place within the section, department or division for which he is acting as steward. Such

seniority preference will enable him to retain his job within the section, department or division for which he is acting as steward so long as such job remains and when the job no longer exists the elected shop steward will be given seniority preference for another job in the same labor grade or successively lower labor grades if he can perform the duties of the job with only such training as an employe with previous experience on such job would require. Elected officers, upon written request of the Local, will be given at the time of reduction in working force similar seniority preference within the bargaining unit in which they are employed.

2. (a) A group of employes not to exceed one per cent of the Active Seniority List but not less than two employes in any bargaining unit will be given preference as set forth below due to special skill in key occupations, or because of unusual ability for training purposes to fill key jobs either in the plants or field locations. The jobs requiring special skill in key occupations for which employes are to be given seniority preference, as differentiated from jobs for training purposes, are to be negotiated locally. The jobs for which employes are to be trained, the list of employes to be given such seniority preference and the reasons therefor will be supplied to the Local and will be kept up-to-date by local Management. The list will be discussed with the Local prior to being made effective. Objections by the Local are subject to the grievance procedure.

(b) Employes on this list may be upgraded or transferred to an open job for the purpose of specialized training. In case of competitive bidding with other employes for the open job, skill and ability will be the determining factor.

(c) An employe on this list will be given seniority preference at the time when lay-offs take place within the section, department or division in which he is employed. Such seniority preference will enable him to retain his job within the section, department or

division so long as such job remains, and when the job no longer exists he will be given preference for another job in the same labor grade or successively lower labor grades if he has had training for such jobs.

(d) If the name of any employe is removed from the list, the job held by such employe shall be declared open and filled in accordance with all applicable seniority provisions as though there were no employe on the job.

K. Details and Procedures

Local supplements will cover the details of the above provisions and in the negotiation of such local supplements due consideration will be given to Management's responsibility for the efficient operation of the Plants. When special problems arise that were not anticipated by local seniority supplements, which will adversely affect the efficient operation of the Plants, they will be subject to negotiation by the local Management and the Local with the intent of resolving the problem in an equitable manner.

SECTION XIII—LEAVE OF ABSENCE

A. Upon the written request of the Local or Union an employe elected to a Local or a Union office or appointed as a full-time Union representative will be granted the usual leave of absence without loss of seniority, not to exceed one (1) year unless an extension is granted, and the determination as to whether such extension will be granted will be reached through collective bargaining between the Local and Plant Management, but in no case shall leave or leaves of absence or extensions thereof total more than three (3) years.

B. At the end of his or her mission such employe who has been granted a leave of absence will be restored on the basis of seniority to his or her former position or similar position at the going rate at the time of his or her return.

SECTION XIV—SETTLEMENT OF DISPUTES

A. Local Grievance Procedure

1. Local Managements are to be kept advised by the Locals as to the names of their authorized representatives.

2. Local officers and stewards will not conduct any form of union business during working hours except after they have been granted permission to do so as provided below. Before leaving work to conduct union business, the Local officer or steward will report to his foreman or supervisor and request permission to leave his job, which will be granted unless his departure would cause serious interference with operations. In such cases the foreman or supervisor will make arrangements for the Local officer or steward to leave his job as promptly as possible.

3. For the purposes of this section union business is defined to mean: (a) investigation of a problem concerning rates of pay, wages, hours of employment, or other conditions of employment; (b) attendance at a meeting with one or more representatives of Management for handling or adjustment of grievances or for the purpose of collective bargaining; and (c) absence from the plant to conduct union business off Company property.

4. There will be three steps for processing grievances at the plant level.

STEP 1. The steward will request permission from his foreman or supervisor to leave his job to investigate a problem concerning rates of pay, wages, hours of employment, or other conditions of employment. The steward will inform the foreman which employe or group of employes he intends to contact. The employe or group of employes must be in the area the steward represents. The foreman will grant permission as provided for in Paragraph A2.

If the problem is not settled, a grievance may then be presented to the foreman. If the grievance cannot then be settled immediately, a time will be set for the first step grievance meeting.

If the steward and the foreman are unable to settle the grievance, the steward may request the presence of the Local representative next in line above him in the Local's organization to further investigate and consult with him concerning the problem, and this permission will be granted. It is not intended that this will be done in every case but only when the steward considers it necessary. Details of arranging for the services of this representative will be determined locally. If the problem is not then resolved, the steward will again meet with the foreman. If the grievance is not then resolved at this step, it goes to the second step.

STEP 2. When a grievance is unresolved at STEP 1, Management and Local representatives at the second level will arrange for a meeting.

STEP 3. When a grievance is unresolved at STEP 2, it will be presented to Management and Local representatives at the third level, who will arrange a meeting.

It is understood that, during discussion of the grievance at STEP 1, the foreman and the steward may investigate the grievance together and at either STEP 2 or STEP 3 a sub-committee of Management and Local representatives may investigate the grievance at the location of the problem.

5. One Union representative (Section or Department Steward) and one Management representative (Section or Department Foreman or Supervisor) will handle grievances at the first step. Union and Management representatives will not exceed three each at the second step and will not exceed seven each at the third step. The titles or designation of the Union and Management

representatives at the second and third steps will be determined locally. The number of representatives and the number of steps may be reduced by local agreement.

6. The Company's only obligation to pay for time spent on union business by Local representatives shall be to divide equally with the respective Locals the payment for time spent within the Plant by Local representatives (who are in the active employ of the Company) during the representatives' regular working hours while meeting with a member or members of local Management for handling or adjustment of grievances, or for the purposes of collective bargaining.

B. General Provisions and Appeal Grievance Procedure

1. It is the intention of this Agreement that local Management and the Locals shall make every effort to settle all grievances at the local level.

2. If local Management's final reply to a grievance of the Local is unsatisfactory, the Local or the Union may choose to refer such grievance to the national level, in which case the Union will so notify the Company's headquarters in writing. When a Local refers a grievance to the national appeal level, or when the Union takes such grievance to the national appeal level, which in either case must be done within thirty (30) days from the date of local Management's final answer, the grievance procedure shall be considered as having been fully exhausted only after the Union advises the Company in writing that the Company's reply at the national appeal level is unsatisfactory. The Local will inform local Management in writing when it refers a grievance to the national appeal level.

3. Upon reference of a grievance to the national appeal level, representatives of the Company and the Union shall meet within thirty (30) days following such reference at a time mutually agreed upon in an effort to settle such grievance. Not later than the time for such meeting, the Union should provide an outline of its position, stating the facts and the contractual provisions on which it relies to support such position. Failure to provide such an outline shall not prejudice the Union in any respect. Written replies shall be given to grievances at the appeal level within fifteen (15) days following conclusion of the appeal level meeting unless Management advises the Union at such meeting that additional time may be required. In that event, the written reply shall be given within thirty (30) days following the conclusion of the appeal level meeting. All of the foregoing time limits may be extended by mutual agreement.

4. The Union and the Company may consider referring a grievance to arbitration in accordance with Section XIV-A by mutual agreement at any time.

5. Should the parties fail to resolve any grievance subject to arbitration under Section XIV-A after exhausting the grievance procedure at the national level, the provisions of Section XIV-A shall apply.

6. Either party's reply to a grievance of the other party will be considered final at any level of the grievance procedure (local or appeal) and the grievance closed, if written notification to the contrary is not received within thirty (30) days of the date of such reply.

7. Failure to present an argument at any step of the grievance procedure shall not prejudice either party at a later step of the grievance procedure or in the arbitration procedure.

SECTION XIV-A—ARBITRATION

A. Except as otherwise provided in this Agreement, any grievance involving action taken or failure to act subsequent to the effective date of Supplement VII to this Agreement which remains unsettled after the grievance procedure has been exhausted pursuant to Section XIV and which involves either

(1) The interpretation, application or claimed violation of a provision of this Agreement or of a local supplement in effect in the bargaining unit in which the grievance arose, or

(2) a disciplinary penalty, release or discharge which is alleged to have been imposed without just cause,

shall be submitted to arbitration upon the written request of either the Union or the Company. Such request shall be made within thirty (30) days after the Company receives notice that its final reply at the national appeal level is unsatisfactory. If no request for arbitration is made by either the Company or the Union during such thirty (30) day period, both parties shall be deemed to have waived their right to make such request. For the purpose of proceedings within the scope of (2) above, the standard to be applied by an arbitrator to cases involving disciplinary penalties, releases or discharges is that they shall be imposed only for just cause.

B. (1) Within fifteen (15) days after receipt of a request for arbitration by the Company or the Union, representatives of the parties shall attempt to reach mutual agreement on the arbitrator. If the parties fail to reach such mutual agreement on the arbitrator within the 15-day period, either party may, within ten (10) days thereafter, request the American Arbitration Association to submit

a list of names from the Association's panels, from which an arbitrator may be chosen.

(2) The parties shall also attempt to reach agreement on the question to be arbitrated. If agreement is reached, either party may withdraw from the agreement at any time thereafter until the hearing is closed if it believes the statement does not properly cover the matters at issue. Such withdrawal shall not prejudice the withdrawing party in any respect.

C. In the selection of an arbitrator and the conduct of any arbitration proceeding, the Voluntary Labor Arbitration Rules of the American Arbitration Association, as amended and in effect March 1, 1952 (and which have remained in effect until the effective date of this Section) shall control, except that:

(1) No arbitrator shall be appointed by the Association who has not been approved by both parties unless and until the parties have had submitted to them three lists of arbitrators from the Association's Panels, and have been unable to select a mutually satisfactory arbitrator therefrom;

(2) Either party may be represented by counsel at any hearing without prior notification to the other party or to the Association;

(3) No modification of such Rules of the Association shall be controlling in any arbitration proceeding under this Agreement without mutual agreement in writing by the Company and the Union, except that both parties will comply with modifications to the extent that they involve the amount of the administrative fees of the Association;

(4) The arbitrator shall have no authority to issue any subpoena or other form of legal process or award to compel either party to produce new evidence (not already presented during processing

of the grievance in the grievance procedure) considered by such party to be confidential or not relevant or material to the proceeding, or which is not available. This shall not limit the arbitrator's authority to compel the production of information which this Agreement or a local supplement requires either party to provide the other;

(5) The American Arbitration Association shall have no authority to process a request for arbitration or appoint an arbitrator if either party shall advise the Association that the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue. In such event, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with this Agreement and the above-mentioned Rules only after a final judgment of a Court has determined that the grievance upon which the arbitration has been requested raises an arbitrable issue or issues. The foregoing part of this Paragraph 5 shall not be applicable if by its terms the request for arbitration requests only relief from a disciplinary penalty, release or discharge alleged to have been imposed without just cause.'

D. Notwithstanding any other provisions of this Agreement, no arbitrator shall, without specific written agreement of the Company and the Union with respect to the arbitration proceeding before him, be authorized to:

(1) Add to, detract from, or in any way alter the provisions of this Agreement or any Supplement or local supplement to this Agreement;

(2) Establish or modify any wage or salary rate, job classification or classification of any employe except as provided in Section VIII, Paragraphs 9. D. and 9. E., or any time value under the incentive system.

(3) Make any award with respect to the release of any new employe during his or her probationary period;

(4) Make any award involving any matter relating to any pension and/or insurance agreement between the parties, any pension or insurance plan referred to or made a part of any such agreement, or the establishment, change, interpretation, application or administration of any pension or insurance plan;

(5) Make any award requiring payment to any employe for any period more than thirty (30) days preceding the filing of the grievance.

E. If the arbitration proceeding concerns a seniority grievance from a plant in which there is no local supplement on seniority at the time the action in question was taken, the arbitrator shall consider the provisions of this Agreement together with the seniority practices existent in the bargaining unit at the time the action in question was taken which are not in conflict with this Agreement.

F. The award of an arbitrator shall be in writing and shall be final and binding upon the parties to this Agreement, the employe or employes involved in the grievance, and the Local representing the bargaining unit in which the grievance arose.

G. The following procedures (not covered by the Rules of the American Arbitration Association referred to in Paragraph C. of this Section) are hereby agreed upon as follows:

(1) A copy of any document furnished to the arbitrator by either party shall also be furnished simultaneously to the other party. If no copy of a document furnished at the hearing is available, a copy will be prepared and furnished to the other party as soon as practicable.

(2) In the event the arbitrator requests the parties

to supply him with a stenographic record of the arbitration proceeding, the parties shall equally divide the cost of one copy for him.

(3) Unless otherwise agreed upon, an arbitration proceeding hereunder shall include only grievances arising from the same plant or identical grievances arising from two or more plants. When an arbitration proceeding includes several grievances arising from the same plant, any identical grievances arising from another plant or plants may also be included.

SECTION XV—BULLETIN BOARDS

The Company will permit the use of factory bulletin boards for the purpose of posting Local notices or other information of interest to members of the Union at the various units, provided that all such notices will be subject to the local Management's approval and arrangements made by the local Management for posting.

SECTION XVI—JURY DUTY

A. When called for jury duty, hourly paid employes will be reimbursed for the difference between the amount paid for such service, not including transportation allowance, and an amount equal to the basic scheduled hours in the period involved times the average earned rate for the preceding calendar quarter. No reimbursement of wages will be made for jury service during furloughs or days that would have been furloughs.

B. Salary paid employes will be paid their regular salary for such period, but will be expected to report for their regular duties when temporarily excused from attendance at court.

SECTION XVII—MILITARY SERVICE

A. Employes drafted into military service will be granted a military leave of absence. The leave of absence

will cover the period of such required military service and will be considered as continuous employment.

B. The employe must apply for re-employment within ninety (90) days from the date of honorable discharge (or the termination of the required period of military service). An employe so applying will be reinstated in his former position, or a position in the bargaining unit which he left on the basis of his seniority under the provisions of this Agreement, providing the employe complies with the following conditions:

1. Application for reinstatement is made within the time period provided above.

2. Official discharge papers are presented.

C. Employes reporting, as provided for in the above provision, who are not qualified to perform the duties of their former position will be given special consideration and local Management will endeavor to place them on suitable jobs.

D. An employe so reinstated will be entitled to participate in insurance and other benefits on the same basis as other employes returning from leave of absence.

SECTION XVIII—MODIFICATION

1. This Agreement expresses the understanding of the parties in respect to matters deemed by them to be Company-wide and generally applicable to the various collective bargaining units, and it will not be changed, modified or varied except by a written instrument signed by duly authorized agents of the parties hereto, and any negotiations relating to proposed changes in such provisions will be carried on between representatives as outlined in Section II.

2. All agreements made locally, other than agreements as to settlement of specific grievances, shall be embodied in local supplements to this Agreement, agreed upon by the respective Locals and local Managements. Such local

supplements shall be in writing and shall cover the procedures for administering the provisions contained in this Agreement and other items of collective bargaining not Company-wide in character and generally applicable to the various collective bargaining units.

3. The parties acknowledge that all agreements arrived at by them during the negotiations concluded by Supplement VII to this Agreement are set forth herein (except to the extent they are set forth in the amended Pension and Insurance Agreement referred to in Paragraph 4 of Supplement I hereto or are contained or referred to in the Strike Settlement Agreement executed contemporaneously with such Supplement VII). Therefore, except as hereinafter specifically provided in this Section XVIII, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subjects or matters not specifically referred to or covered in this Agreement which were discussed during the negotiations of this Agreement and the Supplements hereto.

4. The Local and local Management at each location will, immediately after the execution of Supplement VII to this Agreement, enter into or continue local negotiations for the purpose of concluding local supplements to this Agreement covering items which have been customarily included in local supplements at the respective locations. Should the Local and local Management fail to reach agreement on the terms of such a local supplement after having bargained on the matter in good faith, both parties shall be free to exercise any rights they may have, with respect to the bargaining unit involved only, without regard to the limitations contained in Section VI of this Agreement.

5. All existing local supplements, and those negotiated after the date of Supplement VII, shall be extended to October 15, 1960, subject to the last sentence of Section XIX B. The Company and the Union agree that neither of them nor any Local will request consideration of any proposed changes in or additions to any local supplement to this Agreement, including any general wage or salary adjustments, except as hereinafter provided in this Paragraph 5 and hereafter in Paragraph 7.

(a) Each Local wage supplement shall be reopenable upon written request of either the Local or local Management, after August 14, 1956 and before January 1, 1960, except that an individual local wage supplement is not to be reopened more frequently than once each twelve (12) months by each party, measuring the time from the date of the previous written request of such party. A conference will take place between the Local and local Management within fifteen (15) days from the date of the request for the purpose of beginning negotiations thereon. If, upon any such reopening, settlement is not reached within thirty (30) days after the first meeting, the right to strike or lockout may be exercised at any time within the succeeding thirty (30) days, but written notice thereof will be required at least fifteen (15) days before the beginning of the strike or lockout, which notice may be given during or after the initial negotiating period of thirty (30) days. In the event agreement for changes is not reached as a result of such reopening, the local wage supplement shall continue in effect unchanged.

(b) Upon written request, the Local Union and local Management may reopen local non-wage supplements at any time after November 1, 1957.

Negotiations regarding such requests shall begin within fifteen (15) days from the date of receiving each request. In the event an agreement is not reached regarding proposed changes in such supplements, they shall continue without change. The Local Union and the local Management may not strike or lockout in the event of failure to arrive at agreement on proposed changes.

6. Notwithstanding any other provisions of this Agreement, the parties may reopen this Agreement as follows:

A. Either party may reopen the Agreement by giving written notice to the other party not more than sixty (60) days nor less than thirty (30) days prior to October 1, 1957, for the purpose of considering proposals for changes in, or additions to, the non-economic provisions of this Agreement. If such notice is given, collective bargaining negotiations shall commence within fifteen (15) days from the receipt of the written request and shall be concluded not later than October 31, 1957, unless extended by mutual agreement. In the event agreement is not reached, the Union shall not have the right to strike nor the Company to lockout, and the Agreement shall continue unchanged except with respect to those changes agreed upon.

B. The Union may also reopen this Agreement not more than sixty (60) days nor less than thirty (30) days prior to October 1, 1958 for the purpose of considering proposals for contracting with regard to matters relating to employment security which may be submitted by either the Union or the Company. If such notice is given, collective bargaining negotiations shall commence within fifteen (15) days from the date of receipt of notice. In the event the parties fail to agree concerning such proposals by October 15, 1958, the Union shall

thereafter have the right to strike in support of its proposals without violating Section VI or any other provision of this Agreement, but this Agreement and all local supplements hereto shall continue in effect.

7. Except as hereinbefore provided in this Section XVIII, the Company and the Union agree that neither of them, nor any Locals, will request consideration of any proposed changes in or additions to this Agreement or any local supplement to this Agreement, including any general wage or salary adjustments (either locally or Company-wide) before August 15, 1960. If this Agreement continues in effect for any subsequent contract term or terms beginning on or after October 15, 1960, the provisions of the last sentence above shall apply (substituting the year to which this Agreement is renewed for the figures "1960" wherever they appear). When any such request is received, a conference will take place within fifteen (15) days for the purpose of considering it.

8. If the parties do not reach agreement prior to October 15, 1960, with respect to any requested contractual changes or additions or wage and salary adjustments submitted on or after August 15, 1960, or if the parties do not reach agreement prior to the end of any subsequent contract term, with respect to any requested contractual changes or additions or wage and salary adjustments submitted on or after August 15 of such subsequent contract term, the Union may strike after the beginning of the next succeeding contract term in support of any such requests made by it. Such strike shall not be a violation of Section VI or any other provision of this Agreement, but either party may, upon not less than one (1) day's written notice given to the other during such strike, thereupon terminate this Agree-

ment and all of the supplements and local supplements thereto.

9. The foregoing procedure outlined in paragraph 8, shall apply with respect to unresolved issues involving local supplements at the end of the contract term ending October 15, 1960 or any subsequent contract term, except that the right to strike shall be limited to the bargaining unit or units involved in the dispute, and either the Company or the Union shall have the right to terminate this Agreement and all local supplements insofar as they apply to such bargaining unit or units upon giving the other party not less than three (3) days' written notice of such termination during the continuation of such strike.

SECTION XIX—TERMINATION

A. This Agreement constitutes the Complete Agreement referred to in Section XX—Termination of the Partial Agreement heretofore entered into between the parties as of July 14, 1950, and incorporates, continues, and extends such Partial Agreement except as modified herein. This Agreement having been in full force and effect for a period of two years, and having thereafter been renewed and extended, is further extended and renewed until October 15, 1960, and shall continue and remain in full force and effect from year to year thereafter (such period ending October 15, 1960, and such succeeding periods of one year being sometimes referred to herein as a "contract term"), provided that either party may terminate this Agreement as of midnight, October 14, 1960, or at the end of any succeeding contract term, by giving the other party written notice of such termination at least sixty (60) days before the termination date.

B. Upon termination of this Agreement, all local supplements to this Agreement shall automatically

also terminate. Any such local supplement may also be terminated by any party thereto as of midnight October 14, 1960, or midnight of October 14 of any subsequent contract year during the life of this Agreement, by giving at least sixty (60) days prior written notice to the other party or parties. In addition to the foregoing provisions for termination, which shall apply to all such local supplements, any local supplement or part thereof may also be terminated in accordance with any special termination provision that may be negotiated locally by local Management and the Local and specifically stated in such local supplement.

WESTINGHOUSE ELECTRIC CORPORATION

By Tom Turner

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O.

By James B. Carey

By Michael F. Fitzpatrick

SUPPLEMENT I

Dated the 1st Day of October, 1950 Supplement to Agreement Dated as of the 1st Day of October, 1950 Between Westinghouse Electric Corporation and International Union of Electrical, Radio & Machine Workers (C.I.O.)

1. General Wage Increase

The Company agrees to grant a general wage increase to all hourly paid employes covered by this Agreement of 10¢ per hour effective as of September 18, 1950. This general increase is to be applied for all purposes such as overtime, guaranteed rates, hiring rates, vacations, and night turn bonus, but not for the payment of incentive earnings to incentive workers. The application of the general wage increases granted as of May 9, 1946, April 1, 1947, and June 11, 1948, will continue in effect without change—that is, there will be no change in the calculation and payment of incentive earnings to incentive workers or in the calculation and payment of night turn bonus to incentive workers and dayworkers.

2. General Salary Increase

The Company agrees to grant a general salary increase to all salaried employes covered by this Agreement on a forty (40) hour weekly schedule of $4.00 per week (in the case of employes paid weekly) and $17.35 per month (in the case of employes paid monthly) effective as of September 18, 1950. Proportionately smaller increases will be granted to employes on a weekly schedule of less than forty (40) hours. The maximums of salaried key sheet classifications on a forty (40) hour basis will be increased

by $4.00 in the case of employes paid weekly, and $17.35 in the case of employes paid monthly (with proportionately smaller increases in the maximums of salaried key sheet classifications on less than a forty (40) hour basis). The minimum of salaried key sheet classifications will be increased by such lesser amounts as will retain the same percentage ratios of minimums to maximums as existed before the above-mentioned increases in the maximums, respectively.

3. Special Increases

The Company, in addition to the general wage and salary increase specified above, agrees to establish a special fund consisting of one cent (1¢) per hour for each of the total number of hourly employes and the total number of salaried employes covered by this Agreement who were on the active roll during the third payroll period of September, 1950 (or during the month of September in the case of employes paid monthly). Such fund will be used for the purpose of eliminating inequities by granting additional increases in the key sheet rates of certain jobs and in the wages or salaries of employes covered by this Agreement working on such jobs. Having determined the aggregate amount of the fund, as above provided, the fund shall be distributed in the following manner:

(a) Each local Management and each Local will make recommendations to their respective headquarters.

(b) The fund shall be distributed among the various bargaining units covered by this Agreement by a committee of the Company and a committee of the Union, each committee not to exceed three members.

(c) The amount distributed to each bargaining unit, as provided in sub-paragraph (b) above, shall then be distributed as agreed upon between local Management and the Local involved.

(d) The adjustments agreed upon shall be effective as of October 1, 1950.

(e) It is the intention of the parties hereto to complete their agreements for the distribution of the fund on or before November 15, 1950.

4. All matters concerning pensions and social insurance are provided for in the Pension and Insurance Agreement entered into between the parties as of October 1, 1950.

5. This Agreement, including this Supplement I, is conditioned upon acceptance and ratification by the Union and by the Locals listed in the Appendix attached hereto, and the furnishing of evidence thereof to the Company, all as has been mutually agreed upon between the Company and the Union.

SUPPLEMENT II

Dated the 1st Day of June, 1951
Supplement to Agreement Dated as of the 1st Day of October, 1950
Between
Westinghouse Electric Corporation
and
International Union of Electrical, Radio and Machine Workers (C.I.O.)

1. General Wage and Salary Increase

(a) Subject to sub-paragraph (b) of this Paragraph 1, the Company agrees to grant a general wage increase to all hourly-paid employes covered by this Agreement of nine cents (9¢) per hour and a general salary increase to all salaried employes covered by this Agreement, on a forty (40) hour weekly schedule, of $3.60 per week (in the case of employes paid weekly) and $15.60 per month (in the case of employes paid monthly), such general wage and salary increase to be effective as of April 16, 1951.

(b) The general wage and salary increase referred to in sub-paragraph (a) above shall not become payable until the Company has received any approvals from governmental stabilization authorities which are required by the Company. If the Company has not placed such general increase in effect on or before July 2, 1951, all of the provisions of this Paragraph 1, except this and the following sentence, shall be deemed terminated, and, at the request of either party, negotiations on the subject of a general increase in wages and salaries (as those terms are defined in Paragraph 5 of Section XVIII of this Agreement) shall be resumed. If no agreement on such subject has been reached by July 16, 1951, the Union may thereafter strike in support of its demands without violating Section VI or

any other provision of this Agreement, and if such a strike is called, the Union shall be deemed to have complied fully with the requirements of the National Labor Relations Act, as amended, and particularly Section 8 (d) thereof.

(c) The general wage increase is to be applied for all purposes such as overtime, guaranteed rates, hiring rates, vacations, and night turn bonus, but not for the payment of incentive earnings to incentive workers. The application of the general wage increases granted as of May 9, 1946, April 1, 1947, June 11, 1948 and September 18, 1950, will continue in effect without change—that is, there will be no change in the calculation and payment of incentive earnings to incentive workers or in the calculation and payment of night turn bonus to incentive workers and dayworkers.

(d) Proportionately smaller salary increases than those referred to in sub-paragraph (a) above will be granted to employes on a weekly schedule of less than forty (40) hours. The maximums of salaried key sheet classifications on a forty (40) hour basis will be increased by $3.60 in the case of employes paid weekly, and $15.60 in the case of employes paid monthly (with proportionately smaller increases in the maximums of salaried key sheet classifications on less than a forty (40) hour basis). The minimums of salaried key sheet classifications will be increased by such lesser amounts as will retain the same percentage ratios of minimums to maximums as existed before the above-mentioned increases in the maximums, respectively.

2. Union Security

The Company and the Union agree to add a new Section to the Agreement and immediately following SECTION VI, to be designated as "SECTION VI-A—UNION SHOP", reading as follows:

(The balance of the Union Security provision is not reprinted here since the provision has been incorporated in the Agreement.)

3. Extension of Contract

The Company and the Union agree that the dates July 1, 1951, August 1, 1951, and October 1, 1951, wherever they appear in SECTION XVIII—MODIFICATION, shall, effective immediately, be changed to July 1, 1952, August 1, 1952, and October 1, 1952, respectively; and that SECTION XIX of the Agreement shall, effective immediately, be amended to read as follows:

(The balance of the provision is not reprinted here since the provision has been incorporated in the Agreement).

4. 1952 Reopening Provisions

These reopening provisions were not renewable and by their terms, ceased to exist after April 30, 1952.

5. General Provisions

This Supplement II contains all of the provisions agreed upon as a result of the April, 1951, reopening provided for in SECTION XVIII of the Agreement, and, except as modified herein, all provisions of the Agreement shall remain in full force and effect. This Supplement II shall become binding upon the parties upon its execution by representatives of the Company and of the Union.

Dated and signed June 1, 1951.

WESTINGHOUSE ELECTRIC CORPORATION

By *Tom Turner*

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, C.I.O.

By *James B. Carey*

By *Michael F. Fitzpatrick*

SUPPLEMENT III

Dated the 21st Day of December, 1951
Supplement to Agreement, Including Supplement I thereto, Dated as of the 1st Day of October, 1950, as Modified by Supplement II Dated the 1st Day of June, 1951

Between

Westinghouse Electric Corporation

and

International Union of Electrical, Radio and Machine Workers (C.I.O.)

1. General Wage and Salary Increase

(a) Subject to Section 4, General Provisions, of this Supplement the Corporation agrees to grant a general wage increase to all hourly paid employes covered by this Agreement in accordance with the following tabulation:

Based on Guaranteed Hourly Rate	Increase
to and incl. $1.40	$.050
$1.405 to and incl. 1.53	.055
1.535 to and incl. 1.66	.060
1.665 to and incl. 1.79	.065
1.795 to and incl. 1.92	.070
1.925 to and incl. 2.05	.075
2.055 to and incl. 2.18	.080
2.185 to and incl. 2.31	.085
2.315 to and incl. 2.44	.090
2.445 to and incl. 2.57	.095
Over 2.57	.100

(b) Subject to Section 4, General Provisions, of this Supplement the Corporation agrees to grant a general

salary increase to all salaried employes covered by this Agreement on a forty (40) hour weekly schedule in accordance with the following tabulation:

Weekly Salary Rate 40 Hour Week		Increase Per Week
to and incl.	$ 56.00	$2.00
$ 56.01 to and incl.	62.00	2.20
62.01 to and incl.	68.00	2.40
68.01 to and incl.	74.00	2.60
74.01 to and incl.	80.00	2.80
80.01 to and incl.	86.00	3.00
86.01 to and incl.	92.00	3.20
92.01 to and incl.	98.00	3.40
98.01 to and incl.	104.00	3.60
104.01 to and incl.	110.00	3.80
Over	110.00	4.00

Equivalent increases will be granted to employes paid monthly. Proportionately smaller increases than those shown in the foregoing tabulation will be granted to salary employes on a weekly schedule of less than 40 hours.

(c) The general wage and salary increase referred to in sub-paragraphs (a) and (b) above shall be effective as of November 1, 1951 for all employes on the roll and covered by this Agreement on October 31, 1951.

(d) The general wage increase is to be applied for all purposes such as overtime, guaranteed rates, hiring rates, vacations, and night turn bonus, but not for payment of incentive earnings to incentive workers. The application of the general wage increases granted as of May 16, 1946, May 1, 1947, June 11, 1948, September 18, 1950, and April 16, 1951 will continue in effect without change—that is, there will be no change in the calculation and payment of incentive earnings to incentive workers or in the calculation and payment of night turn bonus to incentive workers and dayworkers. Employes hired on or after November 1, 1951 will be paid in line with adjusted keysheets.

(e) The minimums and maximums of salaried keysheets on a forty (40) hour basis will be increased by the amount

shown in the tabulation in sub-paragraph (b) above with proportionately smaller increases in cases of salary keysheets on a weekly basis of less than forty (40) hours. Salaried employes hired on or after November 1, 1951 will be paid in line with adjusted keysheets.

(f) In the event that the application of the salary increase provisions of this Paragraph 1 result in individual base rates not in conformity with the provisions of Section VIII, Paragraphs 6 d. and e. of the Agreement, such base rates will be increased by such amounts as will place them in conformity with such provisions.

2. 1952 Reopening Provisions

These reopening provisions were not renewable and by their terms, ceased to exist after April 30, 1952.

3. Contract Changes (Incorporated in body of Agreement)

4. General Provisions

(a) The general wage and salary increase provided in sub-paragraphs (a) and (b) of Section 1 shall become payable, and the keysheet adjustments provided for will be made, when the Company has received from the Wage Stabilization Board such necessary approval as is required by the wage stabilization regulations. The change in vacation benefits provided in sub-paragraphs (a) and (b) of Section 3 above is also conditional upon receipt of necessary approval from the Wage Stabilization Board. In the event that the Wage Stabilization Board approves only a portion of the economic benefits referred to in this sub-paragraph, the Company will place such benefits in effect to the extent that they have been approved, and the parties will promptly meet for the purpose of negotiating with respect to a legally permissible method whereby an adjustment in wages and salaries and/or vacations applicable to all employes covered by this Supplement can be made by the Company in lieu of, but not in excess of, any increase provided for by that part of this Supplement

which is not approved. Section VI of the National Agreement shall apply during such negotiations.

(b) On the basis of negotiations held between the Company and the Union, prior to the date hereof concerning the wage, vacation, reopening and termination provisions of the National Agreement dated October 1, 1950 as modified, which negotiations have been concluded by this agreement, all provisions of the National Agreement and Supplement II shall remain in full force and effect, except as modified herein. This Supplement III shall become binding upon the parties upon its execution by representatives of the Company and of the Union.

Dated and signed December 21, 1951.

WESTINGHOUSE ELECTRIC CORPORATION

By *Tom Turner*

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, C.I.O.

By *James B. Carey*

By *Michael F. Fitzpatrick*

SUPPLEMENT IV

Dated the 25th Day of September, 1952 Supplement to Agreement Dated as of the 1st Day of October, 1950

Between

Westinghouse Electric Corporation

and

International Union of Electrical, Radio and Machine Workers (C.I.O.)

1. General Wage and Salary Increase

(a) Subject to paragraph (d) of this Section 1, the Company agrees to grant a general wage increase to all hourly paid employes covered by this Agreement, except those employes specifically referred to in paragraph (c) of this Section 1. Said general increase will be in accordance with the following tabulation and will be computed on their individual base rates for day workers and on their individual guaranteed rates for incentive workers:

Base or Guaranteed Hourly Rate	Increase Per Hour
to and incl. $1.27	$.075
$1.275 to and incl. 1.40	.080
1.405 to and incl. 1.53	.085
1.535 to and incl. 1.66	.090
1.665 to and incl. 1.79	.095
1.795 to and incl. 1.92	.100
1.925 to and incl. 2.05	.105
2.055 to and incl. 2.18	.110
2.185 to and incl. 2.31	.115
2.315 to and incl. 2.44	.120
2.445 to and incl. 2.57	.125
Over 2.57	.130

(b) Subject to paragraph (d) of this Section 1, the Company agrees to grant a general salary increase to all salaried employes covered by this Agreement who are on a forty (40) hour weekly schedule, except those employes specifically referred to in paragraph (c) of this Section 1, in accordance with the following tabulation:

Weekly Salary Rate 40 Hour Week		Increase Per Week
to and incl.	$ 50.80	$ 3.00
$ 50.81 to and incl.	56.00	3.20
56.01 to and incl.	61.20	3.40
61.21 to and incl.	66.40	3.60
66.41 to and incl.	71.60	3.80
71.61 to and incl.	76.80	4.00
76.81 to and incl.	82.00	4.20
82.01 to and incl.	87.20	4.40
87.21 to and incl.	92.40	4.60
92.41 to and incl.	97.60	4.80
97.61 to and incl.	102.80	5.00
Over	102.80	5.20

Monthly Salary Rate 40 Hour Week		Increase Per Month
to and incl.	$220.15	$13.00
$220.16 to and incl.	242.65	13.85
242.66 to and incl.	265.20	14.75
265.21 to and incl.	287.75	15.60
287.76 to and incl.	310.25	16.45
310.26 to and incl.	332.80	17.35
332.81 to and incl.	355.35	18.20
355.36 to and incl.	377.85	19.05
377.86 to and incl.	400.40	19.95
400.41 to and incl.	422.95	20.80
422.96 to and incl.	445.45	21.65
Over	445.45	22.55

NOTE: Proportionately smaller increases than those shown on the foregoing tabulation will be granted to salaried employes on a weekly schedule of less than forty (40) hours.

(c) Because of the general wage and salary increase already received by the employes at Metuchen and Union City as of May 1, 1952 the general wage and salary increase for employes at those locations shall, subject to paragraph (d) of this Section 1, be in accordance with the following tabulations, instead of those in paragraphs (a) and (b) above:

Base or Guaranteed Hourly Rate		Increase Per Hour
to and incl.	$1.210	$.065
$1.215 to and incl.	1.285	.060
1.290 to and incl.	1.415	.065
1.420 to and incl.	1.545	.070
1.550 to and incl.	1.675	.075
1.680 to and incl.	1.715	.080
1.720 to and incl.	1.810	.075
1.815 to and incl.	1.940	.080
1.945 to and incl.	2.070	.085
2.075 to and incl.	2.200	.090
2.205 to and incl.	2.220	.095
2.225 to and incl.	2.335	.090
2.340 to and incl.	2.465	.095
2.470 to and incl.	2.595	.100
Over	2.595	.105

Weekly Salary Rate 40 Hour Week		Increase Per Week
to and incl.	$ 48.40	$ 2.60
$ 48.41 to and incl.	51.40	2.40
51.41 to and incl.	56.60	2.60
56.61 to and incl.	61.80	2.80
61.81 to and incl.	67.00	3.00
67.01 to and incl.	68.60	3.20
68.61 to and incl.	72.40	3.00
72.41 to and incl.	77.60	3.20
77.61 to and incl.	82.80	3.40
82.81 to and incl.	88.00	3.60
88.01 to and incl.	88.80	3.80
88.81 to and incl.	93.40	3.60
93.41 to and incl.	98.60	3.80
98.61 to and incl.	103.80	4.00
Over	103.80	4.20

Monthly Salary Rate 40 Hour Week		Increase Per Month
to and incl.	$209.75	$11.25
$209.76 to and incl.	222.75	10.40
222.76 to and incl.	245.25	11.25
245.26 to and incl.	267.80	12.15
267.81 to and incl.	290.35	13.00
290.36 to and incl.	297.60	13.85
297.61 to and incl.	313.70	13.00
313.71 to and incl.	336.25	13.90
336.26 to and incl.	358.80	14.75
358.81 to and incl.	381.30	15.60
381.31 to and incl.	384.45	16.50
384.46 to and incl.	404.75	15.60
404.76 to and incl.	427.30	16.45
427.31 to and incl.	449.80	17.30
Over	449.80	18.20

NOTE: Proportionately smaller increases than those shown on the foregoing tabulation will be granted to salaried employes on a weekly schedule of less than forty (40) hours.

(d) The general wage and salary increase referred to in Sections (a), (b) and (c) above shall not become payable until the Company has received such approvals from Governmental authorities as are required. In the event that Governmental approval of only a portion of such general wage and salary increase is obtained, the Company will grant said increase to the extent approved and, at the request of either party, negotiations will be held for the purpose of arriving at a legally permissible method whereby an adjustment in wages and salaries applicable to all employes covered by this Agreement can be made in lieu of, but not in excess of, the unapproved amount of the general wage and salary increase set out above. During any such negotiations, Section VI of this Agreement shall apply.

(e) The general wage and salary increase as shown in the above tabulations will be effective as of October 1, 1952, for all employes on the roll and covered by this Agreement on the date any necessary Governmental approvals are received by the Company; if an individual's

rate has changed between October 1, 1952, and the date approval is received, his retroactive payment will be adjusted accordingly.

(f) The general wage and salary increase will be applied for all purposes, such as overtime, guaranteed rates, hiring rates, vacations, and night turn bonus, but not for the payment of incentive earnings to incentive workers. The application of general wage increases granted as of May 16, 1946, May 1, 1947, June 11, 1948, September 18, 1950, April 16, 1951, and November 1, 1951, will continue in effect without change—that is, there will be no change in the calculation and payment of incentive earnings to incentive workers or in the calculation and payment of night turn bonus to incentive workers and dayworkers.

(g) The minimums and maximums of salaried key-sheets on a forty (40) hour basis will be increased by the applicable amount shown in the tabulations above, with proportionately smaller increases in cases of salary key-sheets on a weekly basis of less than forty (40) hours.

(h) In the event application of the salary increase provisions outlined herein results in individual base rates not in conformity with the provisions of Section VIII, paragraphs 6 (d) and (e) of this Agreement, such base rates will be increased by amounts that will place them in conformity with such provisions.

2. Contract Changes (Incorporated in body of Agreement)

3. The Appendix is amended by making the deletion and additions that are necessary by rearranging and renumbering all units into alphabetical order as follows: (Changes incorporated in Appendix)

4. General Provisions

On the basis of negotiations held between the Company and the Union, prior to the date hereof, pursuant to the 1952 reopening provisions of Supplement III and the provisions of Section XVIII of the National Agreement dated

October 1, 1950, as modified, which negotiations have been concluded by this Agreement, all provisions of such National Agreement, as modified by Supplements II and III, shall remain in full force and effect except as modified herein. This Supplement IV shall become binding upon the parties upon its execution by representatives of the Company and of the Union.

Dated and signed September 25, 1952.

WESTINGHOUSE ELECTRIC CORPORATION

BY *R. D. Blasier*

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, C.I.O.

By *James B. Carey*

By *Robert H. Nellis*

SUPPLEMENT V

Dated as of the 30th Day of June, 1953 Supplement to Agreement Dated as of the 1st Day of October, 1950

Between

Westinghouse Electric Corporation

and

International Union of Electrical, Radio and Machine Workers (C.I.O.)

1. Wages and Salary Adjustments

(a) The Company agrees to grant a general wage increase to all hourly paid employes covered by this Agreement, computed on their individual base rates for day workers and on their individual guaranteed rates for incentive workers, in accordance with the following tabulation:

Base or Guaranteed Hourly Rate	Increase Per Hour
to and incl. $1.205	$.03
$1.210 to and incl. 1.85	.04
1.855 to and incl. 1.90	.05
1.905 to and incl. 1.95	.06
1.955 to and incl. 2.00	.07
2.005 to and incl. 2.05	.08
2.055 to and incl. 2.10	.09
2.105 to and incl. 2.15	.10
Over 2.15	.11

(b) The Company agrees to grant a general salary increase to all salaried employes covered by this Agreement

who are on a forty (40) hour weekly schedule, in accordance with the following tabulation:

Weekly Salary Rate	Increase Per Week
to and incl. $48.39	$1.20
$48.40 to and incl. 74.19	1.60
74.20 to and incl. 76.19	2.00
76.20 to and incl. 78.19	2.40
78.20 to and incl. 80.19	2.80
80.20 to and incl. 82.19	3.20
82.20 to and incl. 84.19	3.60
84.20 to and incl. 86.00	4.00
Over 86.00	4.40

Monthly Salary Rate	Increase Per Month
to and incl. $209.72	$ 5.20
$209.73 to and incl. 321.52	6.95
321.53 to and incl. 330.18	8.65
330.19 to and incl. 338.85	10.40
338.86 to and incl. 347.52	12.15
347.53 to and incl. 356.18	13.85
356.19 to and incl. 364.85	15.60
364.86 to and incl. 372.66	17.35
Over 372.66	19.00

NOTE: Proportionately smaller increases than those shown on the foregoing tabulation will be granted to salaried employes on a weekly schedule of less than forty (40) hours.

(c) The wage and salary increases referred to in subparagraphs (a) and (b) above shall be effective as of July 1, 1953 for all employes on the roll covered by this Agreement on that date, and will be applied for all purposes, such as overtime, guaranteed rates, hiring rates, vacation,

and night turn bonus, but not for the payment of incentive earnings to incentive workers. The application of the general wage increases granted as of May 16, 1946, May 1, 1947, June 11, 1948, September 18, 1950, April 16, 1951, November 1, 1951 and October 1, 1952 will continue in effect without change—that is, there will be no change in the calculation and payment of incentive earnings to incentive workers or in the calculation and payment of night turn bonus to incentive workers and day workers.

(d) The minimums and maximums of salaried keysheets on a forty (40) hour basis will be increased by the applicable amount shown in the tabulations above, with proportionately smaller increases in cases of salary keysheets on a weekly basis of less than forty (40) hours.

(e) In the event application of the salary increase provisions outlined herein results in individual base rates not in conformity with provisions of Section VIII, paragraphs 6 d. and e. of this Agreement, such base rates will be increased by amounts that will place them in conformity with such provisions.

2. Contract Changes (effective immediately—incorporated in body of Agreement)

3. General Provisions

(a) On the basis of negotiations held between the Company and the Union, prior to the date hereof, pursuant to the April, 1953 reopening provisions of Supplement IV as incorporated in Section XVIII of the National Agreement dated October 1, 1950, as modified, which negotiations have been concluded by this Agreement, all provisions of such National Agreement, as modified by Supplements II, III and IV, shall remain in full force and effect except as modified herein.

(b) This Supplement V shall become binding upon the parties upon its execution by representatives of the Company and of the Union.

Dated and signed August 24, 1953, effective as of June 30, 1953.

WESTINGHOUSE ELECTRIC CORPORATION

By R. D. Blasier
Vice President

By C. C. Frame
Director of Labor Relations

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (C.I.O.)

By James B. Carey
President

By Robert Nellis
Chairman, Westinghouse Conference Board

SUPPLEMENT VI

Dated the 10th Day of September, 1954 Supplement to Agreement Dated as of the 1st Day of October, 1950

Between

Westinghouse Electric Corporation

and

International Union of Electrical, Radio and Machine Workers (C.I.O.)

1. Wages and Salary Adjustments

(a) The Company agrees to grant a general wage increase to all hourly paid employes covered by this Agreement computed on the individual base rates of dayworkers and upon both the individual base rates and individual guaranteed rates of incentive workers in accordance with the following tabulation:

Daywork Base Hourly Rate or Incentive Guaranteed Hourly Rate	Increase Per Hour
to and incl. $1.70	$.035
$1.705 to and incl. 1.90	.040
1.905 to and incl. 2.10	.045
2.105 to and incl. 2.30	.050
2.305 to and incl. 2.50	.055
2.505 to and incl. 2.70	.060
2.705 to and incl. 2.90	.065
Over 2.90	.070

(b) The Company agrees to grant a general salary increase to all salaried employes covered by this Agreement who are on a forty (40) hour weekly schedule, in accordance with the following tabulation:

Weekly Salary Rate	Increase Per Week
to and incl. $ 68.00	$ 1.40
$ 68.01 to and incl. 76.00	1.60
76.01 to and incl. 84.00	1.80
84.01 to and incl. 92.00	2.00
92.01 to and incl. 100.00	2.20
100.01 to and incl. 108.00	2.40
108.01 to and incl. 116.00	2.60
Over 116.00	2.80

Monthly Salary Rate	Increase Per Month
to and incl. $294.65	$ 6.05
$294.66 to and incl. 329.30	6.95
329.31 to and incl. 364.00	7.80
364.01 to and incl. 398.65	8.65
398.66 to and incl. 433.30	9.55
433.31 to and incl. 468.00	10.40
468.01 to and incl. 502.65	11.25
Over 502.65	12.15

NOTE: Proportionately smaller increases than those shown on the foregoing tabulation will be granted to salaried employes on a weekly schedule of less than forty (40) hours.

(c) The wage and salary increases referred to in subparagraphs (a) and (b) above shall be effective as of July 1, 1954, for all employes on the roll covered by this Agreement on that date, and will be applied for all purposes, such as overtime, guaranteed rates, hiring rates, vacation,

night turn bonus and for the payment of incentive earnings to incentive workers. The application of the general wage increases granted as of May 16, 1946, May 1, 1947, June 11, 1948, September 18, 1950, April 16, 1951, November 1, 1951, October 1, 1952 and July 1, 1953 will continue in effect without change—that is, there will be no change in the calculation of payment of incentive earnings to incentive workers or in the calculation and payment of night turn bonus to incentive workers and dayworkers.

(d) The minimums and maximums of salaried keysheets on a forty (40) hour basis will be increased by the applicable amount shown in the tabulations above, with proportionately smaller increases in cases of salary keysheets on a weekly basis of less than forty (40) hours.

(e) In the event application of the salary increase provisions outlined herein results in individual base rates not in conformity with provisions of Section VIII, paragraphs 6d. and e. of this Agreement, such base rates will be increased by amounts that will place them in conformity with such provisions.

2. Contract Changes (effective immediately) (incorporated in body of Agreement)

3. General Provisions

(a) On the basis of negotiations held between the Company and the Union, prior to the date hereof, pursuant to the modification provisions contained in Section XVIII of the National Agreement dated October 1, 1950, as modified, which negotiations have been concluded by this Agreement, all provisions of such National Agreement, as modified by Supplements II, III, IV and V shall remain in full force and effect except as modified herein.

(b) This Supplement VI shall become binding upon the parties upon its execution by representatives of the Company and of the Union.

Dated and signed September 10, 1954, effective as of September 10, 1954.

WESTINGHOUSE ELECTRIC CORPORATION

By *R. D. Blasier*
Vice President

By *C. C. Frame*
Director of Labor Relations

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (C.I.O.)

By *James B. Carey*
President

By *Robert Nellis*
Chairman
Westinghouse Conference Board

SUPPLEMENT VII

Dated the 20th of March, 1956
Supplement to Agreement Dated as of the 1st Day of October, 1950

Between
Westinghouse Electric Corporation
and
International Union of Electrical, Radio and Machine Workers (AFL-CIO)

1. Wage and Salary Adjustments

(a) Daywork and Salary Increases effective as of the date of this Supplement VII

(1) Hourly Dayworkers

The base rates of all hourly paid daywork employes will be increased in accordance with the following tabulation:

Hourly Paid Employes

Base Rate	Increase Per Hour
to and incl. $1.78 per hr.	0¢
$1.785 to and incl. 1.85 per hr.	.5
1.855 to and incl. 1.92 per hr.	1.
1.925 to and incl. 1.99 per hr.	1.5
1.995 to and incl. 2.06 per hr.	2.
2.065 to and incl. 2.13 per hr.	2.5
2.135 to and incl. 2.20 per hr.	3.
2.205 to and incl. 2.27 per hr.	3.5

Base Rate		Increase Per Hour
$2.275 to and incl.	$2.34 per hr.	4. ¢
2.345 to and incl.	2.41 per hr.	4.5
2.415 to and incl.	2.47 per hr.	5.
2.475 to and incl.	2.53 per hr.	5.5
2.535 to and incl.	2.59 per hr.	6.
2.595 to and incl.	2.65 per hr.	6.5
2.655 to and incl.	2.71 per hr.	7.
2.715 to and incl.	2.77 per hr.	7.5
2.775 to and incl.	2.83 per hr.	8.
2.835 to and incl.	2.89 per hr.	8.5
2.895 to and incl.	2.95 per hr.	9.
2.955 to and incl.	3.01 per hr.	9.5
3.015 to and incl.	3.07 per hr.	10.
3.075 to and incl.	3.14 per hr.	10.5
3.145 to and incl.	3.21 per hr.	11.
3.215 to and incl.	3.28 per hr.	11.5
over	3.28 per hr.	12.

(2) Salary Employes

The base rates of all salaried employes covered by this Agreement who are on a forty (40) hour weekly schedule will be increased in accordance with the following tabulation:

Employes Paid Weekly

Weekly Salary Rate		Increase Per Week
to and incl.	$71.20	0
$71.21 to and incl.	74.00	.20
74.01 to and incl.	76.80	.40
76.81 to and incl.	79.60	.60
79.61 to and incl.	82.40	.80
82.41 to and incl.	85.20	1.00
85.21 to and incl.	88.00	1.20

Weekly Salary Rate		Increase Per Week
$88.01 to and incl.	$ 90.80	$1.40
90.81 to and incl.	93.60	1.60
93.61 to and incl.	96.40	1.80
96.41 to and incl.	98.80	2.00
98.81 to and incl.	101.20	2.20
101.21 to and incl.	103.60	2.40
103.61 to and incl.	106.00	2.60
106.01 to and incl.	108.40	2.80
108.41 to and incl.	110.80	3.00
110.81 to and incl.	113.20	3.20
113.21 to and incl.	115.60	3.40
115.61 to and incl.	118.00	3.60
118.01 to and incl.	120.40	3.80
120.41 to and incl.	122.80	4.00
122.81 to and incl.	125.60	4.20
125.61 to and incl.	128.40	4.40
128.41 to and incl.	131.20	4.60
Over	131.20	4.80

Employes Paid Monthly

Monthly Salary Rate		Increase Per Month
to and incl.	$308.50	$ 0
$308.51 to and incl.	320.64	.85
320.65 to and incl.	332.77	1.75
332.78 to and incl.	344.91	2.60
344.92 to and incl.	357.04	3.45
357.05 to and incl.	369.17	4.35
369.18 to and incl.	381.30	5.20
381.31 to and incl.	393.44	6.05
393.45 to and incl.	405.57	6.95
405.58 to and incl.	417.70	7.80
417.71 to and incl.	428.10	8.65
428.11 to and incl.	438.50	9.55
438.51 to and incl.	448.90	10.40

Monthly Salary Rate			Increase Per Month
$448.91	to and incl.	$459.30	$11.25
459.31	to and incl.	469.70	12.15
469.71	to and incl.	480.10	13.00
480.11	to and incl.	490.50	13.85
490.51	to and incl.	500.89	14.75
500.90	to and incl.	511.29	15.60
511.30	to and incl.	521.69	16.45
521.70	to and incl.	532.09	17.35
532.10	to and incl.	544.22	18.20
544.23	to and incl.	556.36	19.05
556.37	to and incl.	568.49	19.95
	Over	568.49	20.80

NOTE: Proportionately smaller increases than those shown in the foregoing tabulations will be granted to salaried employes on a weekly schedule of less than forty (40) hours.

(b) Improvement Increases

(1) Hourly Paid Employes Increase

The guaranteed rates of all hourly incentive workers and dayworkers, after the adjustments provided for in subparagraph (a) (1) above have been made, shall be increased by the applicable amounts and on the effective dates in accordance with the following table. The base rates of incentive workers (which is that portion of the rate on which incentive earnings are computed) shall be increased each year by 3% (3½% on October 13, 1958, and October 12, 1959) of the base rate in effect on October 14, 1955, and rounded to the nearest ½¢, but not in excess of the amount indicated below.

Effective Dates

Amount of Increase	Effective Date of Supplement VII Current Guaranteed Rate	October 15, 1956 Current Guaranteed Rate	October 14, 1957 Current Guaranteed Rate
$ .05	to and incl. $ 1.75	to and incl. $ 1.80	to and incl. $ 1.85
.055	$ 1.755 to and incl. 1.92	$ 1.805 to and incl. 1.975	$ 1.855 to and incl. 2.03
.06	1.925 to and incl. 2.085	1.98 to and incl. 2.145	2.035 to and incl. 2.205
.065	2.09 to and incl. 2.255	2.15 to and incl. 2.32	2.21 to and incl. 2.385
.07	2.26 to and incl. 2.42	2.325 to and incl. 2.49	2.39 to and incl. 2.56
.075	2.425 to and incl. 2.585	2.495 to and incl. 2.66	2.565 to and incl. 2.735
.08	2.59 to and incl. 2.755	2.665 to and incl. 2.835	2.74 to and incl. 2.915
.085	2.76 to and incl. 2.92	2.840 to and incl. 3.005	2.92 to and incl. 3.09
.09	2.925 to and incl. 3.085	3.01 to and incl. 3.175	3.095 to and incl. 3.265
.095	3.09 to and incl. 3.255	3.18 to and incl. 3.35	3.27 to and incl. 3.445
.10	over 3.255	over 3.35	over 3.445

Amount of Increase	October 13, 1958 Current Guaranteed Rate	October 12, 1959 Current Guaranteed Rate
$ .05	to and incl. $ 1.635	to and incl. $ 1.685
.055	$ 1.64 to and incl. 1.78	$ 1.69 to and incl. 1.835
.06	1.785 to and incl. 1.92	1.84 to and incl. 1.98
.065	1.925 to and incl. 2.065	1.985 to and incl. 2.13
.07	2.07 to and incl. 2.205	2.135 to and incl. 2.275
.075	2.21 to and incl. 2.35	2.28 to and incl. 2.425
.08	2.355 to and incl. 2.495	2.43 to and incl. 2.575
.085	2.50 to and incl. 2.635	2.58 to and incl. 2.72
.09	2.64 to and incl. 2.78	2.725 to and incl. 2.87
.095	2.785 to and incl. 2.925	2.875 to and incl. 3.02
.10	2.93 to and incl. 3.065	3.025 to and incl. 3.165
.105	3.07 to and incl. 3.21	3.17 to and incl. 3.315
.11	3.215 to and incl. 3.35	3.32 to and incl. 3.46
.115	3.355 to and incl. 3.495	3.465 to and incl. 3.61
.12	over 3.495	over 3.61

(2) Salary Increases

The base rates of all salaried employes covered by this Agreement who are on a forty (40) hour weekly schedule after the adjustments provided for in subparagraph (a) (2) above have been made shall be increased in the amounts and on the effective dates in accordance with the following tabulation:

Employes Paid Weekly

Effective Dates

Amount of Increase per Week	Effective Date of Supplement VII Current Salary Rate	October 15, 1956 Current Salary Rate	October 14, 1957 Current Salary Rate
$ 2.00	to and incl. $ 70.00	to and incl. $ 72.00	to and incl. $ 74.00
2.20	$ 70.01 to and incl. 76.80	$ 72.01 to and incl. 79.00	$ 74.01 to and incl. 81.20
2.40	76.81 to and incl. 83.40	79.01 to and incl. 85.80	81.21 to and incl. 88.20
2.60	83.41 to and incl. 90.20	85.81 to and incl. 92.80	88.21 to and incl. 95.40
2.80	90.21 to and incl. 96.80	92.81 to and incl. 99.60	95.41 to and incl. 102.40
3.00	96.81 to and incl. 103.40	99.61 to and incl. 106.40	102.41 to and incl. 109.40
3.20	103.41 to and incl. 110.20	106.41 to and incl. 113.40	109.41 to and incl. 116.60
3.40	110.21 to and incl. 116.80	113.41 to and incl. 120.20	116.61 to and incl. 123.60
3.60	116.81 to and incl. 123.40	120.21 to and incl. 127.00	123.61 to and incl. 130.60
3.80	123.41 to and incl. 130.20	127.01 to and incl. 134.00	130.61 to and incl. 137.80
4.00	over 130.20	over 134.00	over 137.80

Amount of Increase Per Week	October 13, 1958 Current Salary Rate			October 12, 1959 Current Salary Rate		
$ 2.00		to and incl.	$ 65.40		to and incl.	$ 67.40
2.20	$ 65.41	to and incl.	71.20	$ 67.41	to and incl.	73.40
2.40	71.21	to and incl.	76.80	73.41	to and incl.	79.20
2.60	76.81	to and incl.	82.60	79.21	to and incl.	85.20
2.80	82.61	to and incl.	88.20	85.21	to and incl.	91.00
3.00	88.21	to and incl.	94.00	91.01	to and incl.	97.00
3.20	94.01	to and incl.	99.80	97.01	to and incl.	103.00
3.40	99.81	to and incl.	105.40	103.01	to and incl.	108.80
3.60	105.41	to and incl.	111.20	108.81	to and incl.	114.80
3.80	111.21	to and incl.	117.00	114.81	to and incl.	120.80
4.00	117.01	to and incl.	122.60	120.81	to and incl.	126.60
4.20	122.61	to and incl.	128.40	126.61	to and incl.	132.60
4.40	128.41	to and incl.	134.00	132.61	to and incl.	138.40
4.60	134.01	to and incl.	139.80	138.41	to and incl.	144.40
4.80		over	139.80		over	144.40

Employes Paid Monthly

Effective Dates

Amount of Increase Per Month	Effective Date of Supplement VII Current Salary Rate	October 15, 1956 Current Salary Rate	October 14, 1957 Current Salary Rate
$ 8.67	to and incl. $303.32	to and incl. $311.99	to and incl. $320.66
9.53	$303.33 to and incl. 332.79	$312.00 to and incl. 342.33	$320.67 to and incl. 351.86
10.40	332.80 to and incl. 361.39	342.34 to and incl. 371.79	351.87 to and incl. 382.19
11.27	361.40 to and incl. 390.86	371.80 to and incl. 402.13	382.20 to and incl. 413.39
12.13	390.87 to and incl. 419.46	402.14 to and incl. 431.59	413.40 to and incl. 443.73
13.00	419.47 to and incl. 448.06	431.60 to and incl. 461.06	443.73 to and incl. 474.06
13.87	448.07 to and incl. 477.52	461.07 to and incl. 491.39	474.07 to and incl. 505.26
14.73	477.53 to and incl. 506.12	491.40 to and incl. 520.86	505.27 to and incl. 535.59
15.60	506.13 to and incl. 534.72	520.87 to and incl. 550.32	535.60 to and incl. 565.92
16.47	534.73 to and incl. 564.19	550.33 to and incl. 580.66	565.93 to and incl. 597.12
17.33	over 564.19	over 580.66	over 597.12

Amount of Increase Per Month	October 13, 1958 Current Salary Rate	October 12, 1959 Current Salary Rate
$ 8.67	to and incl. $283.39	to and incl. $292.06
9.53	$283.40 to and incl. 308.53	$292.07 to and incl. 318.06
10.40	308.54 to and incl. 332.79	318.07 to and incl. 343.19
11.27	332.80 to and incl. 357.93	343.20 to and incl. 369.19
12.13	357.94 to and incl. 382.19	369.20 to and incl. 394.33
13.00	382.20 to and incl. 407.33	394.34 to and incl. 420.33
13.87	407.34 to and incl. 432.46	420.34 to and incl. 446.32
14.73	432.47 to and incl. 456.72	446.33 to and incl. 471.46
15.60	456.73 to and incl. 481.86	471.47 to and incl. 497.46
16.47	481.87 to and incl. 506.99	497.47 to and incl. 523.46
17.33	507.00 to and incl. 531.26	523.47 to and incl. 548.59
18.20	531.27 to and incl. 556.39	548.60 to and incl. 574.59
19.07	556.40 to and incl. 580.66	574.60 to and incl. 599.72
19.93	580.67 to and incl. 605.79	599.73 to and incl. 625.72
20.80	over 605.79	over 625.72

(c) *The Company agrees that hourly keysheets shall be increased by the applicable amounts shown in the tabulations set out above in sub-paragraphs (a) (1) and (b) (1) and that the maximums and minimums of salaried keysheets on a forty (40) hour basis shall be increased by the applicable amounts shown in the tabulations set out above in sub-paragraphs (a) (2) and (b) (2) with proportionately smaller increases in cases of salaried keysheets on a weekly basis of less than forty (40) hours.*

(d) *The wage and salary increases referred to in paragraphs (a) and (b) above will be applied for all purposes, such as overtime, vacations, night turn bonus and group leading. The application of the general wage increases granted as of May 9, 1946; April 1, 1947; June 11, 1948; September 18, 1950; April 16, 1951; November 1, 1951; October 1, 1952; July 1, 1953; and July 1, 1954, will continue in effect without change—that is, there will be no change in the calculation and payment of incentive earnings to incentive workers or in the calculation and payment of night turn bonus to incentive workers and dayworkers.*

(e) *In the event application of the salary increase provisions outlined herein results in individual base rates not in conformity with provisions of Section VIII, paragraphs 6 d. and e. of this Agreement, such base rates will be increased by amounts that will place them in conformity with such provisions.*

2. *Cost-of-living Increase*

(a) *Effective on and after the date of this Supplement VII, and in addition to wage and salary increases set out in sub-section 1 above, a further provision for adjustment will be made under the cost-of-living formula described in this sub-section 2.*

(b) *The term "Index," as hereinafter used, shall*

be the official Consumer's Price Index, published by the U.S. Bureau of Labor Statistics (1947—1949 = 100).

(c) The cost-of-living formula shall be:

For each full one-half (½) point by which the Index at the beginning of each quarter (starting with the Index for April 15, 1956) exceeds the Index figure of 114.9, one (1) cent per hour shall be added to the earnings of hourly employes. The corresponding addition for salary employes on a forty (40) hour weekly schedule shall be forty (40¢) cents per week or $1.73 per month, with proportionately smaller increases for salary employes on a weekly schedule of less than forty (40) hours. Such additional increase shall be excluded from base rates, guaranteed rates and incentive calculations, but shall be included for other pay purposes (such as overtime, night turn bonus, vacation and holiday pay and payment under the "4 hours of work" provision (Section VIII, Paragraph 4). The appropriate increase under sub-section 1. above shall not in any event be reduced if the Index shall in any quarter fall below 114.9.

(d) The cost-of-living formula shall be calculated and applied quarterly, effective for the first pay period commencing after the Index becomes available, beginning with the April 15, 1956 Index, and adjustments as the result thereof will normally be made in May, August, November and February for hourly paid employes and salary employes on a weekly schedule, and in June, September, December and March for salary employes paid monthly.

(e) In the event the Bureau of Labor Statistics shall not issue the appropriate Index on or before the beginning of one of the periods referred to in sub-paragraph 2 (d) above, any adjustment required by such Index shall be effective at the beginning of the first pay period after receipt of such Index.

(f) No adjustment, retroactive or otherwise, shall be made in pay or benefits as a result of any revision which later may be made in the published figures for the Index for any month on the basis of which the cost-of-living calculation shall have been determined.

(g) In the event the Index, in its present form and calculated on the same basis as the Index for October 15, 1955, shall be discontinued or otherwise become unavailable during the term of this Agreement, the parties will promptly undertake negotiations solely with respect to agreeing upon a substitute formula for determining a comparable cost-of-living adjustment, and failing agreement in such negotiations, the Union shall, upon giving ten (10) days' written notice, have the right to strike solely with respect to such issue.

3. Contract Changes

(Effective Immediately). (Incorporated in body of Agreement).

4. General Provisions

(a) On the basis of negotiations held between the Company and the Union, prior to the date hereof, pursuant to the modification provisions outlined in Section XVIII of the National Agreement dated October 1, 1950, as modified, which negotiations have been concluded by this Agreement, all provisions of such National Agreement, as modified by Supplements II, III, IV, V and VI, shall remain in full force and effect as modified herein.

(b) This Supplement VII, having been approved by the IUE Westinghouse Conference Board, shall become binding upon the parties upon its execution by representatives of the Company and of the Union.

APPENDIX

UNITS FOR WHICH THE UNION OR ITS LOCALS HAVE BEEN CERTIFIED ON THE DATE OF THIS AGREEMENT. AS USED HEREIN, THE TERM "UNION" MEANS THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-C.I.O. AND THE TERM "LOCAL" MEANS A LOCAL OF THE UNION.

ITEM 1

Location: BALTIMORE WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 130

UNIT: All production and maintenance employees of the Employer at its Baltimore Works located at 2519 Wilkens Avenue and 3601 Washington Boulevard Baltimore, Maryland, including group leaders, and shop clerical employees, but excluding all salaried technical, office and office clerical employees, salaried time study clerks, clerical employees in the production planning department, guards, professional employees, and supervisors as defined in the Act.

ITEM 2

Location: BELLEVILLE WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 410

UNIT: All production and maintenance employees of the Employer at its Belleville Works, 720 Washington Avenue, Belleville, New Jersey, including group leaders and truck drivers, but excluding all office and engineering employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 3

Location: BLOOMFIELD WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 410

UNIT: All production and maintenance employees of the Employer at its Bloomfield Works, McArthur Avenue, Bloomfield, New Jersey, including group leaders, but excluding all salaried engineers, technical and clerical employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 4

Location: BLOOMFIELD WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 412

UNIT: All salaried employees, including time and motion analysts III, at the Bloomfield Works of Westinghouse Electric Corporation, McArthur Avenue, Bloomfield, New Jersey, but excluding job analysts, patent attorneys, employment interviewers, secretaries, buyers, administrative staff assistants, the industrial relations assistant, employees in the Paymaster-Cashier's Office, employees in the Research Department classified as technician specialists, laboratory technicians, laboratory assistants or laboratory attendants, all engineers, assistant engineers, junior engineers, production specialists, test engineers, maintenance engineers, plant lay-out engineers, and methods engineers, and all other professional employees, guards, and supervisors as defined in the Act.

ITEM 5

Location: BRIDGEPORT, CONN., MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE: IUE (AFL-CIO)

UNIT: All production and maintenance employees at the Company's manufacturing and repair plant

located at 540 Grant St., Bridgeport, Conn., Excluding executives, office and factory clerical employees, guards, professional employees and supervisors as defined in the Act.

ITEM 6

Location: BUFFALO WORKS
BARGAINING REPRESENTATIVE:
Westinghouse Local 1581

UNIT: All production and maintenance employees of the Employer at its Buffalo Works, 4454 Genesee Street, Buffalo, New York, including group leaders, powerhouse employees, and truck drivers, but excluding office, clerical and plant clerical employees regular welders and welder apprentices (excluding machine welders), guards, professional employees, and supervisors as defined in the Act.

ITEM 7

Location: BUFFALO DISTRICT WAREHOUSE
BARGAINING REPRESENTATIVE:
Local 315

UNIT: All hourly paid warehousemen in the Buffalo, New York, District Warehouse, of Westinghouse Electric Corporation excluding all office and clerical employees, other salaried employees, guards, professional employees and supervisors as defined in Section 2 (11) of the Act, as amended.

ITEM 8

Location: BUFFALO MANUFACTURING AND REPAIR PLANT
BARGAINING REPRESENTATIVE:
Westinghouse Local 315

UNIT: All production and maintenance employees of the Employer at its Buffalo Manufacturing and Repair Plant, 1132 Seneca Street, Buffalo, New York, including

group leaders and janitor-watchmen, but excluding salaried office and clerical employees, draftsmen, guards, professional employees, and supervisors as defined in the Act.

ITEM 9

Location: CLEVELAND PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 777

UNIT: All production and maintenance employees of the Employer at its Cleveland Plant, 1216 West 58th Street, Cleveland, Ohio, including group leaders, powerhouse, salvage, stockroom, shipping, and toolroom employees, but excluding all office and clerical employees, wood and metal pattern makers and apprentices, polishers, buffers, spinners, platers and their helpers, maintenance electricians (including helpers and group leaders), guards, professional employees, and supervisors as defined in the Act.

ITEM 10

Location: CLEVELAND MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 777

UNIT: All production and maintenance employees of the Employer at its Cleveland Manufacturing and Repair Plant, 5901 Breakwater Avenue, Cleveland, Ohio, including group leaders, but excluding all clerical employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 11

Location: COLUMBUS

BARGAINING REPRESENTATIVE:

IUE (AFL-CIO)

UNIT: All employees of the Employer at its Columbus, Ohio, Plant in the following groups: All produc-

tion employees, all toolroom (Tool Department) employees, and all maintenance employees, including the sone maintenance men but excluding all powerhouse employees; and excluding from each group all office and office clerical employees, professional employees, guards and all supervisors as defined in the Act.

ITEM 12

Location: EAST PITTSBURGH WORKS
BARGAINING REPRESENTATIVE:
Westinghouse Local 601

UNIT: All hourly rated employees of Westinghouse Electric Corporation, East Pittsburgh Works (including the Homewood Manufacturing and Repair Plant, and its plants in the boroughs of East Pittsburgh and Turtle Creek, Pennsylvania, its plants in Wilkins Township, Pennsylvania, and its plants at Trafford, Pennsylvania), including group leaders, and all telephone maintenance employees, but excluding all salaried employees other than salaried telephone maintenance employees, all wood and metal pattern makers, wood pattern repairmen and pattern maker apprentices, guards, professional employees and supervisors as defined in Section 2 (11) of the Act, as amended.

ITEM 13

Location: EAST SPRINGFIELD WORKS
BARGAINING REPRESENTATIVE:
Westinghouse Local 202

UNIT: All production and maintenance employees of the Employer at its East Springfield Works, 653 Page Boulevard, Springfield, Massachusetts, including group leaders, shop clerical employees, shipping and receiving clerks, tool and die makers, tool designers, test and inspection employees, repairmen, firemen and operating engineers, and truck drivers, all employees engaged

in the making, altering and repairing of patterns, but excluding all salaried office, clerical (other than shop clerical), technical, and engineering employees, manufacturing engineers, draftsmen, guards, professional employees, and supervisors as defined in the Act.

ITEM 14

Location: FAIRMONT GLASS PLANT

BARGAINING REPRESENTATIVE:

IUE-AFL-CIO

UNIT: All production and maintenance employees employed in the Glass Plant at Westinghouse Electric Corporation's Fairmont works on Hoult Road, Fairmont, West Virginia, including group leaders, but excluding office clerical employees, laboratory technicians, guards, professional employees and all supervisors as defined in the Act.

ITEM 15

Location: FAIRMONT LAMP WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 627

UNIT: All production and maintenance employees of Westinghouse Electric Corporation, Fairmont Lamp Works, Hoult Road, Fairmont, West Virginia, including group leaders, and shipping and accounting clerks, but excluding all employees in the Glass Plant, office clerical employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 16

Location: FAIRMONT MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 627

UNIT: All production, maintenance, and service employees of the Employer at its Fairmont Manufacturing and Repair Plant, Tenth and Beltline Streets, Fairmont.

West Virginia, including group leaders, truck drivers, shippers and receivers, and stock room workers, but excluding office employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 17

Location: HUNTINGTON MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE:

IUE-AFL-CIO Local 670

UNIT: All production and maintenance employees at the Huntington, West Virginia, Manufacturing and Repair plant, including group leaders and plant clerical employees, but excluding office clerical employees, sales office employees, professional and confidential employees, guards and supervisors.

ITEM 18

Location: HUNTINGTON SALES WAREHOUSE

BARGAINING REPRESENTATIVE:

IUE-AFL-CIO Local 670

UNIT: All employees at the Employer's Sales Warehouse located at 1029 7th Avenue, Huntington, West Virginia, but excluding salesmen, office clerical, professional and confidential employees, guards and supervisors.

ITEM 19

Location: INDIANAPOLIS MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE:

IUE-AFL-CIO

UNIT: All production, maintenance, and repair employees of the Employer at its Indianapolis Manufacturing and Repair Plant, 551 West Merrill Street, Indianapolis, Indiana, including group leaders, but excluding office and clerical employees, timekeepers, time-study men, guards, professional employees, and supervisors as defined in the Act.

ITEM 20

Location: JERSEY CITY WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 456

UNIT: All office, clerical, and technical employees of Westinghouse Electric Corporation, Jersey City Works, 150 Pacific Avenue, Jersey City, New Jersey, (including assistant buyers), and all junior engineers and methods engineers, but excluding all staff assistants to department managers or the general manager, buyers, confidential salary pay-roll clerks, paymasters, industrial relations employees; secretaries to company officers, managers and assistant managers, purchasing agents, superintendents, and factory accountants; the internal auditor, budget accountants, the audit clerk, and other professional employees, guards, and supervisors as defined in Section 2 (11) of the Act, as amended.

ITEM 21

Location: LIMA PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 724

UNIT: All hourly paid production and maintenance employees, of Westinghouse Electric Corporation, Lima Plant, Shawnee Township, Allen County, Ohio, including group leaders, pay-card clerks and the shipping clerk, but excluding office, clerical, and salaried technical employees, shop production clerks, design engineers, tool engineers, draftsmen, time-study employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 22

Location: LIMA PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 760

UNIT: All shop production clerks, whether hourly paid or on salary, of Westinghouse Electric Corporation,

Lima Plant, Shawnee Township, Allen County, Ohio, excluding office clerks, guards, professional employees, and supervisors as defined in the Act.

ITEM 23

Location: LOS ANGELES (VERNON) LAMP WAREHOUSE

BARGAINING REPRESENTATIVE: IUE (AFL-CIO)

UNIT: All warehousemen of the Employer's Lamp Division, Vernon, California, excluding the warehouse leadman, all other employees, and supervisors as defined in the Act.

ITEM 24

Location: LOS ANGELES MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE: IUE-AFL-CIO

UNIT: All production and maintenance employees employed by the Employer at the Los Angeles Manufacturing and Repair plant, 3383 East Gage Street, Huntington Park, California, including group leaders, but excluding office and clerical employees, salesmen, draftsmen, guards, professional employees and supervisors as defined in the Act.

ITEM 25

Location: MANOR WORKS

BARGAINING REPRESENTATIVE: Westinghouse Local 601

UNIT: All hourly paid production employees of the Employer at its Manor Works, Penn Township, Westmoreland County, Pennsylvania, including group leaders, but excluding all salaried employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 26

Location: MANSFIELD WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 711

UNIT: All production and maintenance employees of Westinghouse Electric Corporation, Mansfield Works, 246 East Fourth Street, Mansfield, Ohio, including group leaders, tool designers, and hourly paid production factory production clerks, but excluding all other clerical employees, design and technical engineers, draftsmen, time-study employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 27

Location: MANSFIELD WORKS

BARGAINING REPRESENTATIVE:

Westinghouse Local 759

UNIT: All clerical employees of Westinghouse Electric Corporation, Mansfield Works, 246 East Fourth Street, Mansfield, Ohio, excluding all hourly paid factory production clerks, tool designers, engineers other than grades B and C industrial methods engineers, clerical staff specialists, instructors, nurses, resident inspectors, field production specialists, purchase expeditors, buyers, sales and advertising specialists, home economics employees, confidential employees, all employees in the Appliance Engineering, Refrigeration Cabinet Engineering, Industrial Heating Engineering, and Works Engineering Departments, guards, professional employees, and supervisors as defined in the Act.

ITEM 28

Location: METUCHEN PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 401

UNIT: All hourly paid production and maintenance

employees of Westinghouse Electric Corporation, Metuchen, New Jersey, excluding all salaried employees, Powerhouse employes and guards, professional employees and supervisors.

ITEM 29

Location: METUCHEN PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 491

UNIT: All salaried clerical and technical employees of Westinghouse Electric Corporation, Metuchen, New Jersey Plant, including assistant buyers, but excluding all Industrial Relations employees; secretaries to department heads; confidential salary payroll clerk; general payroll clerk; the paymaster-cashier; the internal auditor; budget accountants; buyers; outside expeditors; advertising assistants; sales assistants; rate and tariff analysts; renewal parts coordinators; all professional employees, design engineers, senior engineers, junior engineers, methods engineers, time and motion analysts, manufacturing engineers, nurses; doctors; guards; and supervisors, as defined in the Act.

ITEM 30

Location: NEWARK (N.J.) METER DIVISION

BARGAINING REPRESENTATIVE:

Westinghouse Local 426

UNIT: All production and maintenance employees of the Employer at its Newark Works at 95 Orange Street and 330 Orange Street, Newark, New Jersey, including group leaders, but excluding salaried clerical, technical and engineering employees, salaried inspectors, foremen's clerks, receiving clerks and storeroom clerks, guards, professional employees and supervisors as defined in the Act.

ITEM 31

Location: NEWARK (N.J.) METER DIVISION

BARGAINING REPRESENTATIVE:

Westinghouse Local 426

UNIT: All salaried employees employed at the 95 Orange Street, Plane Street and Raymond Boulevard, Newark, New Jersey, works of the Employer, including the telephone operators and the general duty clerks and the file clerks in the Industrial Relations Department, but excluding all other employees in the Industrial Relations Department, all employees in the Medical Department, staff assistants to department managers and the plant manager, the suggestion interviewer, secretaries, assistant secretaries to the manager of accounting, the buyer, the audit clerk A, manufacturing and general engineers, time and motion analysts, design, metallurgical and chemical engineers in the Engineering Department, sales engineers in the Sales Department, the test engineer in the Manufacturing Department, all draftsmen, tool designers, laboratory technicians, guards, professional employees and supervisors as defined in the Act.

ITEM 32

Location: NEWARK PLANT (NEWARK, OHIO)

BARGAINING REPRESENTATIVE:

Westinghouse Local 714

UNIT: All employees of Westinghouse Electric Corporation, Newark Plant, Newark, Ohio, excluding office and clerical employees, draftsmen, time study employees, watchmen, guards, design and technical engineers, all other professional employees, and all supervisors as defined in Section 2 (11) of the Act, as amended.

ITEM 33

Location: PHILADELPHIA MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE: Westinghouse Local 111

UNIT: All hourly rated production and maintenance employees at the Employer's Philadelphia Manufacturing and Repair Plant, 3001 Walnut Street, Philadelphia, Pennsylvania, including group leaders, salaried inspectors, and production clerks B and C, but excluding production clerks A, telephone operators, guards, professional employees, and supervisors as defined in the Act.

ITEM 34

Location: SHARON WORKS

BARGAINING REPRESENTATIVE: Westinghouse Local 617

UNIT: All hourly paid production and maintenance employees of the Employer at its Sharon Works, 469 Sharpsville Avenue, Sharon, Pennsylvania, including group leaders, all salaried employees in the Tool Department, salaried inspectors, employees in the Production Department, and employees in the Stores and Shipping Department, but excluding all other office and clerical employees, laboratory technicians, employees in the Purchasing Department, time-study employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 35

Location: SPRINGFIELD MANUFACTURING AND REPAIR PLANT

BARGAINING REPRESENTATIVE: IUE (AFL-CIO)

UNIT: All production and maintenance employees of the Westinghouse Electric Corporation at its manufacturing and repair plant located at 395 Liberty Street, Springfield 1, Mass., but excluding

office and factory clerical employees, guards, professional employees and supervisors as defined in the Act.

ITEM 36

Location: TRENTON WORKS

BARGAINING REPRESENTATIVE:

IUE (AFL-CIO)

Unit: All production, maintenance and warehouse employees of the Employer at its Trenton Works, 400 Pennington Avenue, Trenton, New Jersey, including group leaders, the lead wire clerks, and the coil clerk, but excluding all office clerical employees, technical employees, guards, professional employees, and supervisors as defined in the Act.

ITEM 37

Location: UNION CITY PLANT

BARGAINING REPRESENTATIVE:

Westinghouse Local 906

UNIT: All hourly paid production and maintenance employees of the employer's plant located at Union City, Indiana, but excluding all office clericals, all guards, professional employees, and supervisors as defined in the act.

APPENDIX B

APPENDIX B ATTACHED HERETO AND MADE A PART OF THE AGREEMENT DATED AS OF THE FIRST DAY OF OCTOBER, 1950, BETWEEN WESTINGHOUSE ELECTRIC CORPORATION AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AS AMENDED. DESCRIPTIONS OF THE BARGAINING UNITS REFERRED TO HEREIN WILL BE FOUND IN THE APPENDIX.

ITEM 2

Location: BELLEVILLE WORKS
BARGAINING REPRESENTATIVE: Local 410
Date of Certification: April 25, 1951
Case No. 2-UA-6423

ITEM 3

Location: BLOOMFIELD WORKS
BARGAINING REPRESENTATIVE: Local 410
Date of Certification: April 25, 1951
Case No. 2-UA-6424

ITEM 4

Location BLOOMFIELD WORKS
BARGAINING REPRESENTATIVE: Local 412
Effective date of Section VI-A: December, 1952

ITEM 6

Location: BUFFALO WORKS
BARGAINING REPRESENTATIVE: Local 1581
Effective Date of Section VI-A: January 7, 1952

ITEM 7

Location: BUFFALO DISTRICT WAREHOUSE
BARGAINING REPRESENTATIVE: Local 315
Date of Certification: June 1, 1951. Case 3-UA-1561

ITEM 8

Location: BUFFALO M. AND R. PLANT

BARGAINING REPRESENTATIVE: Local 315

Date of Certification: June 1, 1951. Case 3-UA-1562

ITEM 9

Location: CLEVELAND PLANT

BARGAINING REPRESENTATIVE: Local 777

Date of Certification: May 23, 1951. Case 8-UA-2345

ITEM 10

Location: CLEVELAND M. AND R. PLANT

BARGAINING REPRESENTATIVE: Local 777

Date of Certification: May 23, 1951. Case 8-UA-2344

ITEM 11

Location: COLUMBUS PLANT

BARGAINING REPRESENTATIVE: Local 746

Effective Date of Section VI-A: August 9, 1954

ITEM 12

Location: EAST PITTSBURGH WORKS

BARGAINING REPRESENTATIVE: Local 601

Effective Date of Section VI-A: April 23, 1953

ITEM 13

Location: EAST SPRINGFIELD WORKS

BARGAINING REPRESENTATIVE: Local 202

Date of Certification: June 18, 1951. Case 1-UA-3929

ITEM 15

Location: FAIRMONT LAMP WORKS

BARGAINING REPRESENTATIVE: Local 627

Date of Certification: April 9, 1951. Case 6-UA-1454

ITEM 16

Location: FAIRMONT M. AND R. PLANT

BARGAINING REPRESENTATIVE: Local 627

Date of Certification: April 9, 1951. Case 6-UA-1453

ITEM 20
Location: JERSEY CITY WORKS
BARGAINING REPRESENTATIVE: Local 456
Effective Date of Section VI-A: February 2, 1953

ITEM 21
Location: LIMA PLANT
BARGAINING REPRESENTATIVE: Local 724
Date of Certification: May 21, 1951. Case 8-UA-2312

ITEM 25
Location: MANOR WORKS
BARGAINING REPRESENTATIVE: Local 601
Effective Date of Section VI-A: April 23, 1953

ITEM 26
Location: MANSFIELD WORKS
BARGAINING REPRESENTATIVE: Local 711
Date of Certification: April 9, 1951. Case 8-UA-2283

ITEM 27
Location: MANSFIELD WORKS
BARGAINING REPRESENTATIVE: Local 759
Effective Date of Section VI-A: June 14, 1954

ITEM 28
Location: METUCHEN PLANT
BARGAINING REPRESENTATIVE: Local 401
Effective Date of Section VI-A: October 27, 1952

ITEM 29
Location: METUCHEN PLANT
BARGAINING REPRESENTATIVE: Local 491
Effective Date of Section VI-A: May 31, 1954

ITEM 32
Location: NEWARK PLANT (NEWARK, OHIO)
BARGAINING REPRESENTATIVE: Local 714
Date of Certification: March 7, 1951. Case 8-UA-2282

ITEM 33

Location: PHILADELPHIA M. AND R. PLANT

BARGAINING REPRESENTATIVE: Local 111

Date of Certification: March 5, 1951. Case 4-UA-2390

ITEM 34

Location: SHARON WORKS

BARGAINING REPRESENTATIVE: Local 617

Effective Date of Section VI-A: May 20, 1953

ITEM 37

Location: UNION CITY PLANT

BARGAINING REPRESENTATIVE: Local 906

Effective Date of Section VI-A: December 24, 1952

NOTES

NOTES

NOTES

[fol. 170]

SUPREME COURT OF THE UNITED STATES

No. 485—October Term, 1962

JAMES B. CAREY, as President of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION.

ORDER ALLOWING CERTIORARI—April 1, 1963

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted limited to Question 1 presented by the petition which reads as follows;

"Whether a state court is pre-empted of its jurisdiction to enforce arbitration provisions of a collective bargaining agreement by compelling arbitration of a grievance alleging that the employer violated the agreement by assigning work covered by the agreement to employees outside the collective bargaining unit and refusing to apply the terms and provisions of the agreement to the performance of such work."

The case is placed on the summary calendar. The Solicitor General is invited to file a brief, as *amicus curiae*, expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

LIBRARY
SUPREME COURT, U. S.

No. 21 [redacted]

Office-Supreme Court, U.S.
FILED
OCT 4 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway
New York 36, N.Y.
Of Counsel.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2
A. The Proceeding	2
B. The Arbitration Agreement	3
C. Interstate Commerce	4
D. The Grievances	4
1. The Baltimore Grievance	4
2. The East Pittsburgh Grievance	5
Reasons for Granting the Writ	7
A. The Decision Below with Respect to the Baltimore Grievance Is in Conflict with Decisions of This Court Relating to Federal Preemption and Raises an Important Question of Federal Law	7
1. The Preemption Doctrine as Previously Enunciated Does Not Apply to Enforcement of Contracts	8
2. The Action Seeks Enforcement of a Contract	9
3. The Decision Below Raises Important Questions of Federal Law	12
B. The Decision Below with Respect to the East Pittsburgh Grievance Is in Conflict with Decisions of This Court Relating to the Enforcement of Labor Arbitration Agreements and with Decisions of the Court of Appeals for the Third Circuit Interpreting Federal Law	13
Conclusion	18
Appendix A	19
Appendix B	25
Appendix C	28

TABLE OF CASES

	Page
Allis-Chalmers Manufacturing Co., 117 NLRB 744	11
Association of Salaried Employees v. *Westinghouse Electric Corp.*, 348 U.S. 437	9
Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238	8
Baker & Taylor Co., 109 NLRB 245	11
Charles Dowd Box Company v. *Courtney*, 368 U.S. 502	8, 13
Doyle Smith v. *Evening News Association*, Oct. Term 1962, No. 13	7, 12
Employing Plasterers Association, 118 NLRB 17	10
Garner v. *Teamster Union*, 346 U.S. 485	8
General Analine & Film Corp., 89 NLRB 407	10
Guss v. *NLRB*, 352 U.S. 817	12
I.A.M. Lodge No. 1743, AFL-CIO (J. A. Jones Construction Co.), 135 NLRB No. 139, 49 LRRM 1684	12
IUE v. *Westinghouse*, 268 F. 2d 352 (C.A. 3)	16
Local 33, Hod Carriers v. *Mason Tenders Council*, 291 F. 2d 496 (C.A. 2)	11
Local 174, Teamsters v. *Lucas Flour Company*, 369 U.S. 95	8
Local Lodge No. 1836, IAM v. *Raytheon Co.*, No. 419, Oct. Term 1962	7
Marine Engineers Assoc. v. *Interlake Steamship Co.*, 370 U.S. 173	8
McDonnell Aircraft Corp., 109 NLRB 930	9
N.L.R.B. v. *Radio & Television Engineers*, 364 U.S. 573	12
Nepco Unit of Local 95 v. *Nekoosa Edwards Paper Co.*, 287 F. 2d 452 (C.A. 7)	9
Plumbing Contractors Assn., 93 NLRB 1081	10
Radio Corp. of America v. *Associated Professional Engineering Personnel*, 291 F. 2d 105 (C.A. 3) cert. den. 368 U.S. 898	17
Retail Clerks v. *Lion Dry Goods, Inc.*, 369 U.S. 17	11
San Diego Building Trades Council v. *Garmon*, 359 U.S. 736	8
Steelworkers v. *American Mfg. Co.*, 363 U.S. 564	9, 13, 14
Steelworkers v. *Enterprise Wheel Corp.*, 363 U.S. 593,	13, 14

Page

Steelworkers v. *Warrior & Gulf Co.*, 363 U.S. 574 11, 13, 14
Sunnyvale Westinghouse Salaried Employees Ass'n. v. *Westinghouse Electric Corp.*, 175 F. Supp. 685 (W.D. Pa., 1959) 18
Telegraphers v. *Chicago & N.W.R. Co.*, 362 U.S. 330 11
Textile Workers Union of America v. *United Textile Workers*, 258 F. 2d 743 (C.A. 7) 11
Town & Country Mfg., 136 NLRB No. 111, 49 LRRM 1918 11
Underwood Corporation v. *Local 267, IUE*, 183 F. Supp. 205 (Conn. 1960) 18
United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 10
Weber v. *Anheuser-Busch*, 348 U.S. 468 8

OTHER AUTHORITY

N.L.R.B. *Twenty-first Annual Report* (1956) 11

STATUTES

Labor-Management Relations Act of 1947 (61 Stat. 136-162, 29 U.S.C. § 151 *et seq*) 2
Sec. 8(b)(4)D 11, 25
Sec. 9(c) 10, 25
Sec. 10(k) 12, 26
Sec. 301 9, 12, 13, 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, James B. Carey, as President of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals of the State of New York, entered in the above-entitled case on July 6, 1962.

Opinions Below

The opinion of the Court below (Appendix A, *infra*, pp. 19-24) is reported at 11 N.Y. 2d 452, 230 N.Y.S. 2d 703. The opinion and order of the Appellate Division are reported at 15 A.D. 2d 7, 221 N.Y.S. 2d 303 (R. pp. 134-148).* The opinion and order of Special Term appear in the record at pp. 116-127.

---

* References preceded by the letter R refer to the Record on Appeal in the court below, copies of which have been filed herewith.

Jurisdiction

The order and judgment of the Court below (Appendix A, *infra*, pp. 19-24) were entered on July 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (62 Stat. 929).

Questions Presented

1. Whether a state court is pre-empted of its jurisdiction to enforce arbitration provisions of a collective bargaining agreement by compelling arbitration of a grievance alleging that the employer violated the agreement by assigning work covered by the agreement to employees outside the collective bargaining unit and refusing to apply the terms and provisions of the agreement to the performance of such work.

2. Whether a court may deny arbitration of a grievance involving the interpretation, application or claimed violation of a collective bargaining agreement under an agreement providing for arbitration of such grievance on the basis of its conclusion that an arbitrator lacked authority under the agreement to make an effective award.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., § 151 *et seq*) are printed *infra*, as Appendix "B" to the petition (pp. 25-28).

Statement

A. *The Proceeding*

The Union and the Company entered into a collective bargaining agreement on October 1, 1950, which, by successive supplements, has been renewed and extended and includes the times of the grievances which the Union seeks

to arbitrate. The agreement covered many plants of the Company, including its plants at Baltimore, Maryland, and East Pittsburgh, Pennsylvania, where the grievances here at issue arose. (R. 11, 52, 58-59)

Pursuant to the arbitration provisions of the collective bargaining agreement, this proceeding was commenced by the Union to compel arbitration of four unsettled grievances which the Company had refused to arbitrate on the ground that, in its opinion, the grievances did not raise arbitrable issues (R. 8-52). Under the provisions of the arbitration agreement, Section XIV-A, Subsection C (5), when the Company notifies the American Arbitration Association that an unsettled grievance "does not, in its opinion, raise an arbitrable issue," the American Arbitration Association loses its authority to process a request for arbitration until a Court has determined that the grievance does raise an "arbitrable issue or issues" (R. 14-15). The instant petition relates to two of these grievances, one referred to herein as the Baltimore grievance, and the other as the East Pittsburgh grievance. The court below declined to compel arbitration of both grievances.

B. *The Arbitration Agreement*

The arbitration agreement is broad in scope, providing, insofar as material here, for arbitration of any grievances involving action taken or failure to act subsequent to the effective date of the agreement, which involves "the interpretation, application or claimed violation of a provision of this Agreement" (Appendix C, *infra*, p. 29, R. 11-17).

The arbitration agreement does not exclude from arbitration any grievance otherwise within its terms, but limits in certain respects the arbitrator's award-making power in subsection D of Section XIV-A (Appendix C, *infra*, pp.

30-31, R. 15-16). At issue in connection with the East Pittsburgh grievance is the limitation therein that "no arbitrator shall . . . be authorized to: . . . (2) Establish or modify any wage or salary rate, job classification, or classification of any employee . . . or any time value under the incentive system." The denial of arbitration of the Baltimore grievance rests upon a preemption theory and not upon any asserted limitation in the agreement.

C. *Interstate Commerce*

The Company is admittedly engaged in a business which affects commerce within the meaning of the Labor-Management Relations Act, 1947, 29 U.S.C.A. § 152 (6) and (7) (R. 10, 53-57).

D. *The Grievances*

1. *The Baltimore Grievance.*

The Union was certified by the National Labor Relations Board as the collective bargaining representative of the production and maintenance employees at the Company's Baltimore Works. Section I, Paragraph 1, of the collective bargaining agreement, and Item 2 of its Appendix, provide that the Company "agrees to recognize" the Union for this unit, among others (R. 25-26, Appendix C, *infra*, pp. 28, 31-32).

On March 5, 1958, the Union filed a grievance protesting the Company's refusal to apply the provisions of its agreement with the Union to the performance of work on induction heating, including assembly and wiring, power brake operations, machining operations, and attending to tool crib and storeroom operations (R. 24).

The Union contended that the work in question was production work identical to that regularly performed by employees in the Union's bargaining unit (R. 103-104).

The Union contended further the refusal of the Company to apply the agreement to the performance of this work was a violation of the agreement, particularly Section I, 1, the Recognition clause; Section VI-A, B, the Union Shop clause; Section XII, the Seniority clause, and Item 2 of the Appendix to the agreement, the description of the unit covered (R. 104).

The Company refused to arbitrate this grievance on the ground that the question raised by the grievance was within the exclusive jurisdiction of the National Labor Relations Board and further contended that it would be inequitable for the Court to compel arbitration of this grievance (R. 75).

Special Term refused to enforce the arbitration agreement on the ground that this grievance involved the composition of the bargaining unit and was in the sole province of the National Labor Relations Board (R. 127).

The Appellate Division affirmed on the ground that "orderly process" would best be served "by limiting jurisdiction of the issue here to the NLRB and denying recourse to arbitration" (R. 144). Mr. Justice Eager dissented (433).

The Court of Appeals affirmed on the ground that the subject matter of the grievances was "within the exclusive jurisdiction of the NLRB" (Appendix A, pp. 21-22). Mr. Justice Fuld dissented (Appendix A, pp. 23-24).

2. *The East Pittsburgh Grievance.*

In this grievance, the Union claimed that the Company's action in 1957, in lowering the time value allowance, under the incentive system for a molding operation, violated Section VIII, 8, E (2) of the Agreement (Appendix C, *infra*, pp. 28-29, R. 20-23). That Section of the Agreement provides that recorded time values will be changed only

when there is a change in the method of manufacture, tools, materials, design, production conditions, or servicing conditions that affects the time value and that only that portion of the value that is affected by the change will be adjusted. It provides further that "Management recognizes that time values should be revised as soon as possible after the changes have been completed" (R. 89-90).

An adjustment of a time value directly and seriously affects the earnings of the employees who work under the incentive system under which time values determine earnings. The Union alleged that the downward adjustment in the time value complained of was based, in substantial part, on changes which had been made in the operation during the preceding sixteen years. The Union contended that under the above Section, the Company could not aggegate changes in the operation over a long period of time (1938 to 1954) and consider them together with a new change in an operation for the purpose of establishing or modifying a time value. (R. 101-103).

The Company conceded in explanation of its failure to take action at the time of the prior changes that the past changes in the operation "were too insubstantial to warrant an adjustment of the time value" at the time they were made (R. 88).

The Company defended against the Union's motion to compel arbitration on the ground that the "only award which the arbitrator could make in such a proceeding would be an award modifying the new time value * * *" and that this would be in flat violation of Section XIV-A, D, (2), which limits the award-making power of the arbitrator (R. 91). The Company pointed to nothing in the agreement which excludes this grievance from the scope of the arbitration agreement.

Special Term directed arbitration (R. 122-124); the Ap-

pellate Division unanimously reversed. It interpreted the provisions of the agreement or undertaking, and denied arbitration, because, in its view, the Union could not secure an "effectual award." (R. 137-139). The Court of Appeals affirmed on the ground that the agreement to arbitrate did not encompass this grievance because no "valid" award could be made (Appendix A, *infra*, pp. 20-21).

Reasons for Granting the Writ

A. *The Decision Below With Respect To The Baltimore Grievance Is In Conflict With Decisions Of This Court Relating To Federal Preemption And Raises An Important Question Of Federal Law.*

The first issue set forth in this petition is whether the New York courts were preempted of jurisdiction to enforce the arbitration provisions of the collective bargaining agreement between the Company and the Union by virtue of the enactment of the National Labor Relations Act. This issue presents for the Court's consideration another facet of the interrelationship between the statutory scheme for the protection of public rights established in Title I of the Labor Management Relations Act and that established in Title III thereof for the enforcement of private contractual rights. This relationship is also questioned in *Doyle Smith* v. *Evening News Association*, No. 13, Oct. Term 1962 certiorari granted March 26, 1962, and *Local Lodge No. 1836, IAM* v. *Raytheon Co.*, No. 419, Oct. Term 1962, filed Sept. 6, 1962.

The issue here presented is substantially the same as that in the *Raytheon* case, the principal difference being that in the *Raytheon* case the action was initiated in Federal District Court pursuant to Section 301, and in the instant case the action was initiated in the state court of New York. As Federal law governs enforcement of agreements to

arbitrate in the state courts (*Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502), the controlling considerations in both cases are the same.

1. The Preemption Doctrine As Previously Enunciated Does Not Apply To Enforcement of Contracts.

The decision of the New York Court of Appeals with respect to the Baltimore grievance is in conflict with recent decisions of the Court in the *Dowd Box Co.*, *Lucas Flour*, and *Atkinson* cases,[1] and raises a serious question under Federal law pertaining to the regulation of labor-management relations.

The decision below with respect to this issue, with Justice Fuld dissenting, is extremely brief. Without discussion, the court concluded that the Baltimore grievance was "within the exclusive jurisdiction of NLRB," a view which it described as recently "reaffirmed" by the United States Supreme Court in *Marine Engineers Assoc.* v. *Interlake Steamship Co.*, 370 U.S. 173.

The *Marine Engineers Association* case involved the enforcement of state labor relations policy through injunctive process. It was thus of the same character as the action in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 736, and related cases[2] in which the enactment of the National Labor Relations Act was found to confer upon the National Labor Relations Board exclusive jurisdiction.

The doctrine of preemption evolved in this line of cases, however, was expressly held inapplicable by this Court to suits to enforce collective bargaining agreements, whether brought in state or Federal courts. *Charles Dowd Box Co.*

---

[1] *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502; *Local 174, Teamsters* v. *Lucas Flour Company*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238.

[2] E.g., *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468.

v. *Courtney*, 368 U.S. 502; *Local 174, Teamsters* v. *Lucas Flour Company*, 369 U.S. 95, 101, n. 9; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245, n. 5. Congress considered, but rejected, proposals to put enforcement of collective bargaining agreements within the jurisdiction of the NLRB. Instead it specifically created in Section 301 machinery to facilitate contract enforcement through private action. *Charles Dowd Box Co.* v. *Courtney*, 368 U.S., at 513; *Association of Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U.S. 437, n. 2.

2. The Action Seeks Enforcement Of A Contract.

Whatever overtones the Baltimore grievance may carry with respect to the Union's certification, the grievance sought to be arbitrated is a work assignment grievance. The essential question to be answered in arbitration is whether the Company was obligated by its agreement to assign the work in question to employees covered by its agreement with the Union and to apply the terms of the agreement to the performance of this work.[3] The agreement provides that an arbitrator's authority over the grievance will extend to the interpretation, application, or claimed violation of the agreement involved in the action taken by the Company. The clearly announced federal policy is to enforce agreements to arbitrate with respect to every arbitrable grievance. *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564.

The Board recognizes the distinction between certification and work assignment on which the arbitrability of this grievance is based. In *McDonnell Aircraft Corporation*, 109 NLRB 930, the Board rejected a claim that an

[3] The grievance as written (R. 115) fairly sets forth the nature of the issue raised. Grievances need not be drawn with the precision of a common law complaint. *Nepco Unit of Local 95* v. *Nekoosa Edwards Paper Co.*, 287 F. 2d 452 (C.A. 7).

employer refused to bargin in violation of Section 8(a)(5) of the Act when it unilaterally transferred work outside a bargaining unit and refused to recognize the certified union as representative of the employees performing this work. The Board viewed the transfer of work outside the unit as an action,

> "which gave rise to a *dispute over the interpretation and administration of the agreement which should be and was resolved through the collective bargaining process.* Indeed, it is apparent that the Union, which instituted this proceeding, originally recognized this dispute to be one of contract interpretation when it appropriately invoked the contractual grievance procedure." 109 NLRB, at 934. (Emphasis added.)

Thus, the Board, to which the court below would give exclusive jurisdiction over this grievance as a certification matter, has specifically held that an identical grievance is properly viewed as a contract matter to be handled through the grievance and arbitration procedure. Other decisions of the Board confirm the difference between certification and work assignment. *General Analine & Film Corp.*, 89 NLRB 407; *Plumbing Contractors Association*, 93 NLRB 1081; *Employing Plasterers Association*, 118 NLRB 17. A unit determination and certification only identifies the group of employees for which a bargaining representative is designated.[4] It does not preclude an em-

[4] Even if this grievance were assumed to touch matters which the Board might consider in a certification proceeding pursuant to Section 9, it was not the intention of Congress to preclude the settlement of such matters through privately agreed upon means. An employer and a union may agree upon the appropriate unit and the majority status of the union without any intercession by the Board. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72, n. 8. Use of the Board's machinery for the determination of representatives is but one of the alternative

ployer from altering the work assignments of its employees. The determination of work assignment which involves wages, hours and other terms and conditions of employment is a matter for collective bargaining and inclusion in a collective bargaining agreement. *Town & Country Mfg.*, 136 NLRB No. 111, 49 LRRM 1918. Cf. *Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330.[5] A unit determination answers the question, "Who does the union represent?" An agreement as to work assignment answers the question, "What work do they perform?" It is the Union's contention in this case that the parties reached agreement as to the assignment of work. It now seeks to enforce that agreement through arbitration.

The grievance sought to be arbitrated also differs from a jurisdictional dispute within the meaning of Section 8(b)(4)(i)(D) and 8(b)(4)(ii)(D) of the Act. The Union has engaged in no conduct which falls within Section 8(b)(4)(i) or (ii). *Local 33, Hod Carriers* v. *Mason Tenders Council*, 291 F. 2d 496, 504 (C.A. 2). The Union seeks

---

methods available if the parties are unable to agree upon voluntary methods for determining this question. NLRB, *Twenty-First Annual Report*, 29 (1956). Even where the Board's processes are invoked, the Board encourages consent elections and gives the widest scope to agreements reached as to the appropriate unit. *Allis-Chalmers Manufacturing Co.*, 117 NLRB 744, 745; *Baker & Taylor Co.*, 109 NLRB 245, 246. Section 9 does not impose limitations on Section 301 of the Act. *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17. See also *Textile Workers Union of America* v. *United Textile Workers*, 258 F. 2d 743 (C.A. 7), cited therein.

[5] While these cases involve bargaining over the assignment of work to employees of other employers through subcontracting, it makes no effective difference whether an employer seeks to assign work to other of its employees outside the unit or to employees of another employer. From the standpoint of the contractual right which the Union seeks to enforce, the grievance herein is the same as the grievance over subcontracting as to which arbitration was compelled in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574.

only to enforce its agreement through the agreed upon means.[6]

3. The Decision Below Raises Important Questions Of Federal Law.

The decision below significantly limits the enforceability of agreements to arbitrate under Section 301 and to that extent frustrates and impairs the underlying policy of the national labor laws to foster the peaceful and voluntary settlement of disputes through arbitration. Section 203(d) of the Act. Like the parallel decision in *Doyle Smith* v. *Evening News Association, supra,* now under review, it would increase rather than decrease the burden of the Board and substitute the uncertainty of the Board's exercise of its processes for the certainty of contractual means for settlement of disputes. Cf. *Guss* v. *NLRB,* 352 U.S. 817. More important, it would thwart Congress' avowed intent to provide for enforcement of collective bargaining agreements in the courts. The extension of the preemption doctrine in the decision below beyond the bounds charted by this Court thus raises questions of the federal law relating to enforcement of collective bargaining agreements which are substantial and warrant its review.

---

[6] Moreover, even where a jurisdictional dispute within the meaning of Section 8(b)(4)(D) exists, the procedure provided in Section 10(k) of the Act stresses voluntary means of settling such disputes. If no voluntary means is agreed upon, the Board must decide the dispute, relying among other things, upon arbitrators awards and the terms of agreements. *NLRB* v. *Radio & Television Engineers,* 364 U.S. 573; *I.A.M. Lodge No. 1743 AFL-CIO (J. A. Jones Construction Co.),* 135 NLRB No. 139, 49 LRRM 1684. It would be indeed anomalous to deny courts jurisdiction to enforce arbitration of work disputes out of deference to the Board's special expertise, while the Board is commissioned to search the opinions of arbitrators to find guidance for the resolution of such disputes.

B. *The Decision Below With Respect to the East Pittsburgh Grievance Is In Conflict with Decisions of This Court Relating to the Enforcement of Labor Arbitration Agreements and With Decisions of the Court of Appeals for the Third Circuit Interpreting Federal Law.*

The decision of the Court of Appeals with respect to the East Pittsburgh grievance raises an important question of federal law relating to the enforcement of collective bargaining agreements under Section 301 (a) of the Labor-Management Relations Act (29 U.S.C. § 185, 61 Stat. 156) and is in conflict with the mandate of this Court in the *American Manufacturing, Warrior & Gulf,* and *Enterprise Wheel* cases,[7] as well as decisions of the Court of Appeals for the Third Circuit. The Court of Appeals for the State of New York, no less than the federal courts, was bound to follow and apply federal law. (*Charles Dowd Box Company* v. *Courtney,* 368 U.S. 502) It did not do so, and its decision gives rise to diversity and conflict which it "is one of the traditional functions of this Court . . . to resolve and accommodate." 368 U.S., at 514.

In *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574, 582-583, this Court held:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Here the arbitration clause provides without limitation for arbitration of unsettled grievances involving "the in-

---

[7] *Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel Corp.,* 363 U.S. 593, decided June 20, 1960.

terpretation, application, or claimed violation" of any provision of the agreement. The limitation on which the court below relied was not a limitation upon the arbitrability of grievances, but limited the authority of an arbitrator "with respect to the arbitration proceeding before him." Thus, the limitation on which the court below relied by its very own terms presumed arbitrability of the grievance. Indeed, the exclusion clause in the *Warrior & Gulf* case which this Court rejected as a bar to arbitration was a clearer exclusion from arbitration than the limitation on which the court below relied herein. Here there is, in fact, no doubt as to arbitrability because the grievance clearly involves interpretation, application, *and* a claimed violation of Section VIII of the Agreement. But even if arbitrability is not clear, there is at the very least doubt as to the coverage of the arbitration clause, which the court resolved against arbitration by becoming involved with the merits of the grievance and which it should have resolved without reference thereto in favor of arbitration.

The decision of the court below is doubly disturbing because in interpreting the limitation on the arbitrator's authority as an exclusion of subject matter from arbitration, the court has performed a function "not normal to the courts" (363 U.S., at 581) in prejudging the possible remedies available for the alleged contract violation and concluding that arbitration of this grievance could result in no "valid award."

This judicial "summary judgment" of the grievance ignores the purpose of arbitration and the basic facts of industrial life. It denies the Union the "informed judgment" of an arbitrator for which it bargained. See *Steelworkers* v. *American Manufacturing Co.*, 363 U.S., at 567; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S., at 578-583; *Steelworkers* v. *Enterprise Wheel Corp.*, 363 U.S., at 597.

The grievance which the Union sought to arbitrate per-

mits a number of possible awards within the authority of the arbitrator, awards which interpret, apply, or find violations of the agreement *without* establishing a new time value or modifying existing values. An arbitrator could, without any further remedy, render an award interpreting Section VIII, 8, E, of the agreement to preclude consideration of changes in the manufacturing process which occur more than a certain period before a time value is revised as a basis for changing time values. Such an award would not establish or modify a time value, but it would nonetheless be a valuable award, clarifying the meaning of the disputed provision and providing a settled basis for further discussion of the time value at issue in this grievance and in any future grievances of a similar nature which might arise under the national collective bargaining agreement.

An arbitrator could go further to find that the Company violated the agreement in modifying the time value here at issue, while still refraining from any remedial action in his award. Again such an award would have a significant impact upon the settlement of the dispute between the parties, without exceeding the authority of the arbitrator. There is no need to set forth other alternative awards which are possible. This is a matter best left to the imagination and ingenuity of an arbitrator. The above examples amply demonstrate that meaningful valid awards are indeed possible.

As this Court has observed, "The processing of disputes through the grievance procedure is actually a vehicle by which meaning and content are given to the collective bargaining agreement." 363 U.S. at 581. The decision below would frustrate any effort to give meaning and content to Section VIII, 8, E of the collective bargaining agreement, except through industrial strife for which "arbitration is the substitute." 363 U.S., at 578. Because the objective in arbitration "is primarily to further the goal of un-

interrupted production under the agreement, to make the agreement serve [the parties'] specialized needs," even the processing of "frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware." 363 U.S., at 582, 568.[8] Where the grievance is not frivolous, the therapeutic value of interpretation of the contract or a finding that it has been violated is patent. Only the cynical presumption that the Company when presented with an award of the type above described will not comply with its agreement because an arbitrator may not himself establish or modify the time value, would justify denying the Union the arbitration for which it bargained. Such a presumption has no place in any proceeding which rests upon a statutorily based policy of avoiding industrial strife through voluntary settlement of disputes.

The decision of the court below is in direct conflict with decisions of the United States Court of Appeals for the Third Circuit. In *IUE* v. *Westinghouse*, 268 F. 2d 352 (C.A. 3, 1959), the identical parties and contract provisions were involved. The court held that in determining whether the Company had violated Section VIII, 8, E of the agreement in modifying time values, the arbitrator's task would be to interpret the contract and to determine whether Westinghouse was within or in violation of its contract. The court held: "In reaching these conclusions, the arbitrator would

---

[8] Assuming *arguendo* that the instant grievance was frivolous, an arbitrator's decision that the Company properly took into account all changes in the manufacturing method, regardless of their age, would settle a significant source of dissatisfaction to employees and contribute to the elimination of future disputes. Indeed, the statement of the court below that "Nowhere in the collective bargaining agreement is there a statement which could be construed to mean that there has been an agreement for 'therapeutic' arbitration, incapable of enforcement," stands without further comment, as the best illustration of the reason why its decision must be reviewed to prevent serious erosion of the principles set forth by this Court.

neither be establishing new time values or modifying the present ones. He would be merely declaring what the particular actual time value situations are by correct interpretation of the existing written collective bargaining agreement." See also *Radio Corporation of America* v. *Associated Professional Engineering Personnel*, 291 F. 2d 105 (C.A. 3, 1961), *cert. den.* 368 U.S. 898.

The decision below brushes aside the opinions in these cases and relies on two distinguishable District Court decisions,[9] thereby creating serious confusion in the federal law pertaining to enforcement of arbitration. If not reversed, it will result in an increase in litigation over the arbitration obligation and in frustration of the methods for peaceful settlement of industrial disputes with a resultant increase in industrial interest. Accordingly, the aspect of the decision below should also be reviewed so that serious questions it raises as to the underlying principles of the federal law may be answered.

---

[9] *Underwood Corporation* v. *Local 267, IUE*, 183 F. Supp. 205, (Conn., 1960), and *Sunnyvale Westinghouse Salaried Employees Ass'n* v. *Westinghouse Electric Corp.*, 175 F. Supp. 685 (W.D. Pa., 1959), were both decided prior to June 1960. In the *Underwood* case, the exclusion on which the Court relied was clearly an exclusion from arbitration and not a limitation on the arbitrator's authority. In the *Sunnyvale* case, which was affirmed *per curiam* by the Third Circuit, 276 F. 2d 927, also prior to June, 1960, the relief claimed was beyond the arbitrator's authority. In the light of the later *Radio Corporation* decision, there is substantial doubt whether the *Sunnyvale* decision remains good authority in the Third Circuit.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway
New York 36, N. Y.
Of Counsel.

APPENDIX A

STATE OF NEW YORK COURT OF APPEALS

No. 150

In the matter of JAMES B. CAREY, AS PRESIDENT OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O., *Appellant-Respondent*,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, *Respondent-Appellant*.

OPINION

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

PER CURIAM:

We are in accord with the disposition of the Appellate Division in modifying the order of Special Term.

This appeal, the facts of which have been sufficiently set forth in the opinions below, results from a motion to compel the arbitration of three grievances. Arbitration has been ordered as to one, and denied as to the others.

Whether the grievance at the Mansfield, Ohio plant actually concerns re-hiring or discharge is properly a matter to be decided by the arbitrator. Furthermore, the Company is not prejudiced by the inartful manner in which the complaint was originally drawn, since it clearly understood the thrust of the problem.

As to the delay in seeking a court order for arbitration, allegedly amounting to an abandonment of the claim in this case involving a collective bargaining agreement, that question should be argued in the forum which the parties have voluntarily chosen—arbitration. (See, *Matter of Straight Line Foundry & Machine Corp.* v. *Wojcik*, 9 N.Y. 2d 867;

Matter of Novelty Fabrics Corp. v. *Fink*, 2 N.Y. 2d 894; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593). Nothing herein, however, is to be construed as changing decisions in the usual arbitration cases, such as *Matter of Zimmerman* v. *Cohen*, 236 N.Y. 15.

We think that the grievance arising at the East Pittsburgh plant, involving the "time value allowance", was not covered by the provisions of the collective bargaining agreement which provided for arbitration. "[S]ince arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute" (*Steelworkers* v. *American Mfg.*, *supra*, 570-571). The parties here having agreed that no arbitrator should have authorization to "establish or modify" time values, it is clear that such problems had, by agreement, been taken out of the arbitration process outlined in the contract. To submit such a grievance to arbitration now would be an idle gesture, as no valid award could be made. Nowhere in the collective bargaining agreement is there a statement which could be construed to mean that there has been an agreement for "therapeutic" arbitration, incapable of enforcement.

Not only is the character of the time values which may have been set in the original agreement to be determined here (See, *Radio Corporation of America* v. *Association of Professional Engineering Personnel*, 291 F. 2d 105; *International Union of Electrical, Radio and Machine Workers* v. *Westinghouse Electric Corporation*, 268 F. 2d 352), but in addition how much, if at all, pre-existing changes in procedures could be incorporated into management's change of the time values. This must, necessarily, encompass an equitable modification of existing values, which is beyond the range of the authority granted to the arbitrator by the parties (See, *Underwood Corporation* v. *Local 267, International Union of Electrical, Radio & Machine Workers*, 183 F. Supp. 205; *Sunnyvale Westinghouse Salaried Employees*

Association v. *Westinghouse Electric Corporation*, 175 F. Supp. 685).

Finally, the grievance at the Baltimore plant, involving the definition of the bargaining units, seems to us under federal law to be within the exclusive jurisdiction of NLRB, which has the expertise to make clear the precise nature of the bargaining units certified by it. This view has recently been reaffirmed by the United States Supreme Court, in the following language (*Marine Engineers Beneficial Assoc.* v. *Interlake Steamship Co.*, — U.S. —, 30 LW 4437, June 11, 1962):

> "A centralized adjudicatory process is also essential in working out a consistent approach to the status of the many separate unions which may represent interrelated occupations in a single industry. Moreover, as the national agency charged with the administration of the federal labor law, the Board should be free in the first instance to consider the whole spectrum of possible approaches to the question, ranging from a broad definition of 'labor organization' in terms of an entire union to a narrow case-by-case consideration of the issue. Only the Board can knowledgeably weigh the effect of either choice upon the certainty and predictability of labor management relations, or assess the importance of simple administrative convenience in this area.
>
> * * * * * * *
>
> The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the Board. While the Board's decision is not the last word, it must assuredly be the first. In addition, when the Board has actually undertaken to decide an issue, relitigation in a state court creates more than a theoretical danger of actual conflict between state and federal regulation of the same controversy."

The First Circuit appears to have reached the same conclusion, in reversing the District Court, in *Raytheon Co.* v. *Local Lodge No. 1836 of District 38 IAM*, — F.2d —, 50 LRRM 2337, decided June 4, 1962. (See also, *International Chemical Workers Union* v. *Olin Mathieson Chemical Corporation*, 202 F. Supp. 363).

The order appealed from should be affirmed, without costs.

COURT OF APPEALS

IN THE MATTER OF JAMES B. CAREY, ETC., *Petitioner-Appellant,*

against

WESTINGHOUSE ELECTRIC CORPORATION, *Respondent-Cross-Appellant.*

FULD, J. (dissenting in part):

I would modify the order appealed from by reversing so much of it as denies arbitration of the Baltimore plant grievance.

The fact that the matter sought to be arbitrated, turning as it does on a bargaining unit description in the contract's recognition clause, may also involve an unfair labor practice or a question concerning representation which may ultimately give rise to a proceeding before the National Labor Relations Board does not deprive the court of authority to order arbitration and enforce the agreement.

The underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process. (See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Co.*, 363 U.S. 593; *Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 504; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95.)

The controlling statute, section 301 of the National Labor-Management Relations Act, envisages parallel private and public proceedings in situations where a breach of an agreement also involves determinations under the Act. Section 301 was designed to vindicate private rights under a contract, while section 8, relating to unfair labor practices, and section 9, relating to representation, were designed to vindicate public rights provided under the National Labor Relations Act. The circumstance that there might be a claim before the National Board *at some date*

in the future should not operate to deprive the parties of contract rights at the present time. (But cf. *Raytheon Co.* v. *Local Lodge No. 1386 of District 38 IAM*, — F. 2d — [50 LRRM 2337, decided by Court of Appeals, First Circuit, June 4, 1962, revg. 201 F. Supp. 334, in which two unions had actually asserted conflicting claims as to representation.) The pre-emption postulates enunciated by the Supreme Court over the past several years (see, e.g., *Garner* v. *Teamsters Union*, 346 U.S. 485; *San Diego Unions* v. *Garmon*, 353 U.S. 26; *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, — U.S. —, decided June 11, 1962) concerned actions instituted in state courts to remedy torts which were, arguably, an unfair labor practice or, arguably, a protected activity under the Federal statute.[1] The prohibitions spelled out in those cases against state court intrusion upon the exclusive jurisdiction of the National Labor Relations Board have no applicability to actions for breach of a collective bargaining agreement.

The collective bargaining agreement governing wages, hours and conditions of employment is the ultimate objective of the labor relations laws. Arbitration is an integral part of the administration and enforcement of the collective bargaining agreement, and Federal and State court sanction an essential aid to such process.

. . . . . .

Order affirmed, without costs. Opinion Per Curiam. All concur except Fuld, J., who dissents in part and votes to modify in a separate opinion.

---

[1] In any event, since there was here no claim that the union restrained or coerced the employees or engaged in or encouraged the employees to engage in a strike or resorted to any of the other activities defined in section 8 (b) of the National Labor Relations Act, there is no basis for any charge that the union was guilty of unfair labor practice or prohibited conduct under that statute.

APPENDIX B

STATUTE INVOLVED

The statute involved is the Labor Management Relations Act, of 1947, Act of June 23, 1947; C. 120, 61 Stat. 136-162, 29 U.S.C. § 151 et seq.

SEC. 8

(b) It shall be unfair labor practice for a labor organization or its agents—

* * * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

SEC. 9.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

SEC. 10.

* * * * * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute

with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

SEC. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individul member or his assets.

APPENDIX C

The following are the pertinent provisions of the collective bargaining agreement on which this action is based:

Section I—Recognition

1. The Company agrees to recognize the Union, on behalf of and in conjunction with its Locals, for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. The units and Locals referred to in the preceding sentence are set forth in the Appendix attached hereto and made a part of this Agreement.

2. Any units for which the Union or any of its Locals shall be lawfully certified by the National Labor Relations Board as exclusive bargaining representative, shall, upon assent in writing to this Agreement by such representative, be included in and covered by this Agreement as of the date of certification, except that either party may withhold the application of those portions of this Agreement considered inapplicable to such units by giving written notice to the other party within thirty (30) days of such representative's assent.

Section VIII—Wages

Wages will be paid in accordance with wage schedules effective in the various bargaining units. All wage schedules are negotiated locally. The following provisions affecting wages are applicable to all units. • • •

8. Time Values and General Wage Procedures for Incentive Operations

• • • • • • •

E. Recorded time values (as differentiated from temporary time values) will be changed only for the following reasons:

(1) When a clerical error has been made in the determination of the time value.

(2) (a) When there is a change in the method of manufacture, tools, material, design, production conditions or servicing conditions that affects the time value, only that portion of the value affected by the change will be adjusted. Sufficient additional elements to those affected by the change may be time studied to determine the effect of the change on the existing time value.

(b) When a change is to be made in an operation, the time value for which is not broken down into elements, a time study may be taken before the change is made in order to establish the elements of the existing time value; but the time value will not be changed as a result of this study. When the change in the operation is made the provisions of sub-section (2) (a) of this paragraph will apply.

(c) Management recognizes that time values should be revised as soon as possible after the changes have been completed.

* * * * * * *

SECTION XIV-A—ARBITRATION

A. Except as otherwise provided in this Agreement, any grievance involving action taken or failure to act subsequent to March 20, 1956, which remains unsettled after the grievance procedure has been exhausted pursuant to Section XIV and which involves either

(1) The interpretation, application or claimed violation of a provision of this Agreement or of a local supplement in effect in the bargaining unit in which the grievance arose, or

(2) a disciplinary penalty, release or discharge which is alleged to have been imposed without just cause,

shall be submitted to arbitration upon the written request of either the Union or the Company. Such request shall be made within thirty (30) days after the Company receives

notice that its final reply at the national appeal level is unsatisfactory. If no request for arbitration is made by either the Company or the Union during such thirty (30) day period, both parties shall be deemed to have waived their right to make such request. For the purpose of proceedings within the scope of (2) above, the standard to be applied by an arbitrator to cases involving disciplinary penalties, releases or discharges is that they shall be imposed only for just cause.

* * * * * * *

C. In the selection of an arbitrator and the conduct of any arbitration proceeding, the Voluntary Labor Arbitration Rules of the American Arbitration Association, as amended and in effect March 1, 1952 (and which have remained in effect until the effect until the effective date of this Section) shall control, except that:

* * * * * * *

(5) The American Arbitration Association shall have no authority to process a request for arbitration or appoint an arbitrator if either party shall advise the Association that the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue. In such event, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with this Agreement and the above-mentioned Rules only after a final judgment of a Court has determined that the grievance upon which the arbitration has been requested raises an arbitrable issue or issues. The foregoing part of this Paragraph (5) shall not be applicable if by its terms the request for arbitration requests only relief from a disciplinary penalty, release or discharge alleged to have been imposed without just cause.

D. Notwithstanding any other provisions of this Agreement, no arbitrator shall, without specific written agreement of the Company and the Union with respect to the arbitration proceeding before him, be authorized to:

(1) Add to, detract from, or in any way alter the provisions of this Agreement or any Supplement or local supplement to this Agreement;

(2) Establish or modify any wage or salary rate, job classification or classification of any employe except as provided in Section VIII, Paragraphs 9. D. and 9. E., or any time value under the incentive system;

(3) Make any award with respect to the release of any new employe during his or her probationary period;

(4) Make any award involving any matter relating to any pension and/or insurance agreement between the parties, any pension or insurance plan referred to or made a part of any such agreement, or the establishment, change, interpretation, application or administration of any pension or insurance plan;

(5) Make any award requiring payment to any employe for any period more than thirty (30) days preceding the filing of the grievance.

. . . . . .

F. The award of an arbitrator shall be in writing and shall be final and binding upon the parties to this Agreement, the employe or employes involved in the grievance, and the Local representing the bargaining unit in which the grievance arose.

. . . . . .

APPENDIX

UNITS FOR WHICH THE UNION OR ITS LOCALS HAVE BEEN CERTIFIED ON THE DATE OF THIS AGREEMENT. AS USED HEREIN, THE TERM "UNION" MEANS THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O. AND THE TERM "LOCAL" MEANS A LOCAL OF THE UNION.

. . . . . .

ITEM 2

Location: BALTIMORE WORKS—X-RAY AND INDUSTRIAL ELECTRONICS DIVISION AND ORDNANCE DIVISION BARGAINING REPRESENTATIVE:

Westinghouse Local 130

UNIT: All production and maintenance employees of the Employer at its Baltimore Works located at 2519 Wilkens Avenue and 3601 Washington Boulevard, Baltimore, Maryland, including group leaders, and shop clerical employees, but excluding all salaried technical, office and office clerical employees, salaried time study clerks, clerical employees in the production planning department, guards, professional employees, and supervisors as defined in the Act.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 5 1962
JOHN F. DAVIS, CLERK

No. 21

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O.,

Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JOHN D. CALHOUN,
Counsel for Respondent,
1 Chase Manhattan Plaza,
New York 5, N. Y.

CRAVATH, SWAINE & MOORE,
JOHN F. HUNT, JR.,
Of Counsel.

November 2, 1962

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	3
I. The Baltimore Grievance	3
II. The East Pittsburgh Grievance	5
ARGUMENT	6
I. The Baltimore Grievance	6
A. The Decision Below is Correct	6
B. The Petition Shows No Conflict	14
II. The East Pittsburgh Grievance	17
CONCLUSION	19

TABLE OF AUTHORITIES

JUDICIAL AND ADMINISTRATIVE DECISIONS

Amperex Electronic Corp. v. *Rugen*, 284 App. Div. 808, 132 N. Y. S. 2d 93 (2d Dep't 1954) 16

Atkinson v. *Sinclair Refining Co.*, 370 U. S. 238 (1962) 8, 14

Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U. S. 767 (1947) 6

Douds v. *Internat'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957) 12

Dowd Box Co. v. *Courtney*, 368 U. S. 502 (1962) ... 7, 14

Drake Bakeries, Inc. v. *Local 50, American Bakery & Confectionery Workers Internat'l*, 370 U. S. 254 (1962) 8

PAGE

Freight Drivers and Helpers Local 557, Etc. v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961) 16

Garner v. *Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U. S. 485 (1953) 7

Intern'l Chemical Workers Union, Local 6 v. *Olin Mathieson Chemical Corp.*, 202 F. Supp. 363 (S. D. Ill. 1962) 15

Internat'l Longshoremen's Ass'n, 118 N. L. R. B. 1418 (1957) 12

Klein v. *Styl-Rite Optics, Inc.*, 8 App. Div. 2d 811, 188 N. Y. S. 2d 421 (1st Dep't 1959) 16

La Crosse Tel. Corp. v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949) 7

Local 33, Internat'l Hod Carriers v. *Mason Tenders District Council*, 291 F. 2d 496 (2d Cir. 1961) 9

Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. *Lucas Flour Co.*, 369 U. S. 95 (1962) 8, 14

Local 459, Intern'l Union of E. R. & M. Workers v. *Remington Rand*, 191 N. Y. S. 2d 876 (Sup. Ct. N. Y. Cty. 1959) 16

Madison Glass Specialty Co., Inc., In re, N. Y. L. J., July 3, 1961, p. 3 (Sup. Ct. N. Y. Cty.) 16

Marine Engineers Beneficial Ass'n v. *Interlake Steamship Co.*, 370 U. S. 173 (1962) 7, 13

McDonnell Aircraft Corp., 109 NLRB 930 (1954) 16

New York Mailers' Union, Local 6 v. *New York Times*, 43 Lab. Cas. Par. 17, 309, N. Y. L. J. Oct. 28, 1961 p. 12 (Sup. Ct. N. Y. Cty.) 16

New York Mailers' Union, Local 6 v. *Publishers' Ass'n of New York City*, 43 Lab. Cas. Par. 17, 310, N. Y. L. J. Nov. 28, 1961, p. 13 (Sup. Ct. N. Y. Cty.) 16

NLRB v. *Radio and Television Broadcast Engineers*, 364 U. S. 573 (1961) 9

PAGE

Raytheon Co. v. *Local No. 1505 Internat'l Brotherhood of Electrical Workers*, 304 F. 2d 365 (1st Cir. 1962) 15

Retail Clerks v. *Food Fair Stores*, 48 LRRM 2284 (E. D. Pa. May 3, 1961) 16

Retail Clerks Internat'l Ass'n v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962) 8, 13

Textile Workers Union v. *Lincoln Mills*, 353 U. S. 448 (1957) 7

United Textile Workers of America v. *Textile Workers Union of America*, 258 F. 2d 743 (7th Cir. 1958) 9, 13

United Steelworkers of America v. *American Mfg Co.*, 363 U. S. 564 (1960) 7

United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 7

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) 7

Weber v. *Anheuser-Busch*, 348 U. S. 468 (1955) 7

Westinghouse Electric Corp., 138 N. L. R. B. No. 90 (1962) 10

STATUTES

Labor Management Relations Act, 1947, 61 Stat. 136 *et seq.*, *as amended*, 29 U. S. C. §§ 141 *et seq.* (Supp. 1959-60), 29 U. S. C. A. §§ 141 (Supp. 1960) *et seq.*:

§ 2 7

§ 7 ..... 6, 7, 8, 9

§ 8 ..... 6, 15, 16

§ 8(a)(1) 9

PAGE

§ 8(a)(3) 9
§ 8(a)(5) 9
§ 8(b)(3) 9
§ 8(b)(4) 9, 11
§ 9 ..... 3, 6, 7, 9, 10, 11, 13
§ 10(j) 12
§ 10(k) 9, 11
§ 301 ..... 7, 9, 13, 14, 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, A. F. L.—C. I. O.,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

No. 485

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court below is set forth in Appendix A to the petition and the opinions and orders of the Appellate Division and Special Term are set forth in the record at pages 134-48 and 116-27. The opinion below is reported at 11 N. Y. 2d 452 (1962) and the opinion of the Appellate Division is reported at 15 App. Div. 2d 7 (1961).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether petitioner (Union) is entitled to specific performance of an alleged agreement by respondent (Company) to submit a grievance to arbitration where:

(a) the Union has been certified by NLRB as majority representative for a unit consisting of "production and maintenance" employees of the Company at one of its plants and has a collective bargaining agreement which obligates the Company to recognize the Union as bargaining agent for the "production and maintenance unit" as certified by the Board;

(b) a second union (Federation) has been certified by NLRB as majority representative of a unit consisting of "salaried technical" employees at the plant in question and has a collective bargaining agreement which obligates the Company to recognize the Federation as the bargaining agent for the "salaried technical unit" as certified by the Board;

(c) each of the aforesaid collective bargaining agreements obligates the Company* to submit to arbitration grievances which involve contract interpretation, application or claimed violation;

(d) the Union's grievance claims that certain employees in the "salaried technical" unit are doing production and maintenance work and, hence, the Company is contractually obligated to recognize the Union as their bargaining agent; and

(e) the result of the requested arbitration (i) would not bind the Federation and (ii) if favorable to the Union would conflict with NLRB unit determinations and representation certifications, whereas proceedings

*Subject to various exceptions not relevant here.

before the NLRB for clarification of the content of the bargaining units involved would effectively resolve the underlying representation differences between the two unions as to which the Company is neutral?

2. Whether the New York courts correctly decided that the arbitration provisions of the collective bargaining agreement between the Union and the Company, construed in light of the *Steelworkers* cases, do not embody the consent of the Company to arbitration of a grievance in which the Union challenges a time value established by the Company under its incentive compensation system?

Statement

I. The Baltimore Grievance.

NLRB, in the exercise of its exclusive and plenary powers under § 9 (61 Stat. 143, as amended, 29 U. S. C. § 159 (Supp. 1959-60), 29 U. S. C. A. § 159 (Supp. 1960)) of the Taft-Hartley Act (Act), has determined two appropriate "units" of employes, for purposes of collective bargaining representation, in the Company's Baltimore X-Ray and Industrial Electronics operations—a production and maintenance unit and a salaried technical unit (Rec. 66-67, ff 197-200). In accordance with those determinations, a predecessor of the Union was chosen by a majority of the employees in the former unit to be their collective bargaining representative and the Federation of Westinghouse Independent Salaried Unions (Federation) was chosen by a majority of the employees in the latter unit to be their collective bargaining representative (*id.* at 67, ff 200-01). In 1955, the Union obtained from NLRB a redetermination of the content of the production and maintenance unit and a new election for that unit. As a result of the new election,

the Union was certified as the collective bargaining representative for that unit (*id.* at 68-69, ff 203-05).

The Company's X-Ray and Industrial Electronics operations in Baltimore include an Engineering Laboratory which develops and makes new, non-standard equipment (*id.* at 66, ff 196-97). Certain types of jobs found in the production and maintenance unit are also found in the Engineering Laboratory—for example, hourly paid machinists do production and maintenance work but the Engineering Laboratory also employs specially skilled machinists, *salaried,* to perform its functions (*ibid.*) The Engineering Laboratory employees, as a group, voted in the representation election in which the Federation was chosen as collective bargaining representative of the salaried technical unit (*id.* at 67, ff 200-01.)

The election notice (describing employees eligible to vote) with respect to the 1955 election in which the Union became collective bargaining representative for the production and maintenance unit did not include the Engineering Laboratory employees who are the subject of the Baltimore grievance (*id.* at 69, f 205). The Union did not protest the description contained in that notice and Engineering Laboratory employees did not vote in that election (*id.* at 69, ff 205-06).

The foregoing history of the Baltimore unit determinations and representation certifications was affirmed by the New York courts at all levels of adjudication (*id.* at 124-25 and 141-42, ff 370-75 and ff 422-24; Pet. App. 19).

The Baltimore grievance claims that Engineering Laboratory employees who perform tasks within the Laboratory, which are similar to tasks performed in production operations, should be in the production and maintenance unit. Prior to the filing of the petition the Union at all times recognized that the basic thrust of the grievance is

to obtain recognition of the Union as bargaining agent for a certain group of Engineering Laboratory employees (and to have its collective bargaining agreement with the Company applied to such employees); Rec. 69-70, ff 207-08, 115, ff 343-44, 27, f 81. The New York courts have confirmed that such was the nature of the Baltimore grievance; *id.* at 125-26, ff 275-76, 142, ff 424-25 and Pet. App. 19.

II. The East Pittsburgh Grievance.

The East Pittsburgh grievance claims that the Company violated the provisions of its collective bargaining agreement with the Union by taking into account, upon revision of a time value assigned to a particular work operation at its East Pittsburgh plant,* several minor changes in work method applicable to that operation which had accumulated over many years prior to the specific change which gave rise to the revision. The Company denied arbitrability on the ground that it had not consented to arbitration of grievances of this sort.

The provisions of the collective bargaining agreement between the parties which bear on whether the Company has consented to arbitration of the East Pittsburgh grievance are: (i) the provisions of subsection D of § XIV-A of the agreement ("Notwithstanding any other provisions of the Agreement, no arbitrator shall . . . Establish or modify . . . any time value under the incentive system."), (ii) the provisions of clause C.(5) of Article XIVA-A (arbitration may not proceed until after a judicial determination of arbitrability), (iii) the provisions of Article VI B, the limited no-strike clause (Union may strike if Company denies arbitrability) and (iv) the provisions of Section XIV 4 and 5 (which show that, while any dispute may be the subject of a grievance, not every grievance is arbitrable under § XIV-A). See App. B and Pet. App. 30-31.

*A "time value" is a measure of compensation under the Company's incentive compensation system.

On the basis of the foregoing contractual provisions, the Court of Appeals and the Appellate Division unanimously interpreted and applied the provisions of the agreement relating to arbitration as not including consent of the Company to arbitration of the East Pittsburgh grievance. See Pet. App. 20 and Rec. 139, ff 415-17.

Argument

I. THE BALTIMORE GRIEVANCE

A. The Decision Below Is Correct.

The issues on certiorari are analyzed in the petition as though provisions of the collective bargaining agreement assigned certain work to the Union and the grievance sought to be arbitrated concerned the interpretation, application or claimed violation of those provisions. The pleadings and the findings of the courts below make clear that the Baltimore grievance is a representation, certification and unit content controversy. Viewed in this perspective, the decision below is a necessary and logical accommodation of the Federal law relating to (i) enforcement of contractual obligations between labor and management as provided for by Section 301 of the Act and (ii) the express and implied requirements of the Act that certain types of labor controversies be determined by NLRB.

The doctrine of "exclusivity" or "primacy" of NLRB jurisdiction over issues under Sections 7, 8 and 9 of the Act originated in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767 (1947), which held that a state labor board certification of a unit of supervisors must be set aside because Federal law (at that time, the "Wagner Act") had entrusted jurisdiction to NLRB. While the statute did not expressly provide for exclusivity, a Congressional intent to that effect was in-

ferred from the legislative scheme because of considerations of uniformity, special forum for Federal policy implementation, expertise, etc. Subsequent decisions have upheld NLRB exclusivity in respect of certification and representation issues under Section 9 (*La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949) (affirming the *Bethlehem* doctrine under the "Taft Hartley" Act)), and have extended the doctrine to exclude adjudication by state and Federal courts and also state labor agencies of conduct in labor disputes which was arguably either protected under Section 7 or prohibited under Section 8 of the Act. See, *e.g.*, *Garner* v. *Teamsters, Chaffeurs and Helpers Local Union No. 776*, 346 U. S. 485 (1953) and *Weber* v. *Anheuser-Busch*, 348 U. S. 468 (1955), etc. The most recent expansion of the doctrine is *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962), which held that NLRB must initially construe and apply to particular factual situations threshold definitional issues under the Act, such as whether an organization is a "labor organization" within the meaning of Section 2.

Subsequent to the enactment of Taft-Hartley and concurrently with the development of the foregoing body of precedent, this Court has developed a body of precedent relating to the enforceability under Section 301 of collective bargaining agreements, especially agreements to arbitrate disputes. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957); *United Steelworkers of America* v. *American Mfg Co.*, 363 U. S. 564 (1960), *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960),* *Dowd*

*American Mfg., Enterprise Wheel & Car and Warrior & Gulf are collectively referred to as the *Steelworkers'* cases.

Box Co. v. *Courtney*, 368 U. S. 502 (1962), *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), *Retail Clerks Internat'l Ass'n* v. *Lion Dry Goods Inc.*, 369 U. S. 17 (1962), and *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers Internat'l*, 370 U. S. 254 (1962). Those cases establish, among other things, that state and Federal courts must enforce labor management agreements to arbitrate disputes, must apply Federal law to such proceedings and, because of policy implications of Section 301, should, upon finding consent to arbitration, construe the scope of that consent broadly.

In addition to the doctrines of the foregoing cases, the question of the arbitrability of the Baltimore grievance involves the entire scheme of the Act and the Federal labor policies embodied in that scheme.

Concededly, the Company has contractually obligated itself to recognize the Union as collective bargaining agent "for those units wherein the Union or its locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative." (Agreement, Section I 1, Pet. App. 28), including, specifically, the "UNIT" consisting of "All production and maintenance employees of the employer at its Baltimore Works". (Agreement, p. 59, Pet. App. 31-32). The question before the court below in the Baltimore grievance was: In light of all the facts of record in respect of the Baltimore grievance, in what forum should the Union's contention (that a group of Engineering Laboratory employees now represented by the Federation should be represented by the Union) be adjudicated—a question to be answered in terms of the statutory scheme evidenced by the Act and the Federal labor policies embodied in the Act.

Section 7 of the Act guarantees to employees a right "to bargain collectively through representatives of their

own choosing". Sections 8(a)(1) and (3) obligate the Company to remain neutral in respect of representation controversies between rival unions. Section 9 entrusts to the NLRB exclusive jurisdiction to determine what units of employees constitute appropriate units for purposes of conducting representation elections in which employees may exercise their rights guaranteed by Section 7. Section 8(a)(5) obligates the Company to bargain collectively with the Federation as the certified representative of employees in the salaried technical unit at its Baltimore plant and would make it an unfair labor practice on the part of the Company to fail to do so. The collective bargaining agreement between the Company and the Federation (which is the result of their good faith bargaining as required by Sections 8(a)(5) and 8(b)(3)) is enforceable by virtue of the provisions of Section 301. The entirety of the Act is designed, in the national interest, to promote industrial peace and to eliminate industrial strife (both strife between labor and management and strife between rival labor organizations).*

In the face of that statutory framework and those paramount statutory policies, the answer to the legal issue resolved against the Union in the decision below is clear. The Union's claim that its production and maintenance unit at the Company's Baltimore plant should include the disputed group of Engineering Laboratory employees now included in the Federation's salaried technical unit at that

*As this Court recognized in *NLRB* v. *Radio and Television Broadcast Engineers*, 364 U. S. 573 (1961), Sections 8(b)(4) and 10(k) of the Act evidence a strong national policy that employers should not be gored in disputes between two rival unions. Section 301 also recognizes that policy in providing for enforcement of inter-union agreements resolving, or providing for arbitration to resolve, union disputes over work assignments and organizational "jurisdiction". See *Local 33, Internat'l Hod Carriers* v. *Mason Tenders District Council*, 291 F. 2d 496 (2d Cir. 1961) and *United Textile Workers of America* v. *Textile Workers Union of America*, 258 F. 2d 743 (7th Cir. 1958).

plant arose from NLRB unit determinations and representation certifications, should now be resolved by NLRB proceedings and can be effectively resolved only by such proceedings.

The Union has the right to file a Section 9 petition with the Board seeking clarification of its unit. The Board has resolved questions as to whether a single employee ought to be included in a given unit (*Westinghouse Electric Corp.*, 138 N. L. R. B. No. 90 (1962) and would unquestionably entertain a clarification motion involving the "More than 50% of the production and maintenance workers" which the Union alleges to be involved in the Baltimore grievance (Rec. 104, f 310). If for any reason the Board should decline to entertain a clarification motion, the Union could force a Board adjudication by requesting a certification election in Baltimore and proposing, in connection with that request, that the election unit include the disputed group of employees. The Union's right to Board action on such a petition would be absolutely certain, although the Board might limit the election to one in which only the disputed group of employees voted to choose as between the Union and the Federation.*

The NLRB proceeding under Section 9 would be a proceeding in which the Federation could intervene to protect its salaried technical unit and the agency supervised election would be one in which the Federation could protect its representation jurisdiction and the employees affected could exercise their choice between the two rival unions. Whether or not the Federation should intervene, it would be bound by the results. Thus a final adjudication binding on all interested parties and according to all interested parties their statutory rights can only be achieved through NLRB proceedings.

---

*The "contract bar" rule, if applicable here, could postpone, but not prevent, such an election.

If the Union had obtained arbitration with the Company of the Baltimore grievance and been successful in that arbitration, the results would be completely inconsistent with Federal labor policies and the statutory scheme provided by the Act. An arbitrator's award obligating the Company to bargain exclusively with the Union in respect of the disputed employees would not dispense the Company from its statutory obligation to bargain with the Federation in respect of those employees or its contractual duty to recognize the Federation as their bargaining agent. The arbitration proceeding would not be an adversary proceeding because the Company is, and must be, neutral in respect of its subject matter. Not only would the Federation not be bound by the arbitrator's award but, if the Company complied with it, the Federation could (i) institute an unfair labor practice complaint with NLRB for refusal to bargain, (ii) call a strike over the dispute (and thus force the matter into NLRB under Section 8(b)(4) and 10(k)) or (iii) obtain an arbitrator's award under its contract with the Company which might be inconsistent with the Union's arbitration award. If, on the other hand, the Company felt constrained to refuse to honor the Union's arbitration award, it would be forced to go to NLRB under Section 9 to obtain an adjudication of the underlying issues and that adjudication, if contrary to the arbitrator's award, would obviously override it. Furthermore, absent NLRB action, the statutory rights of the employees affected will be ignored.

NLRB action in respect of the situation underlying the Baltimore grievance is, in one way or another and at one time or another, inevitable. Postponement of agency action until after a meaningless *ex parte* arbitration between the Company and the Union is not calculated to eliminate industrial strife but to increase it and to interject a period of chaos in the relations among the parties.

On the basis of all the foregoing factors it seems unarguable that, under the facts and circumstances of the Baltimore grievance, the orderly procedures contemplated and provided for by the Act require that the Union's grievance be adjudicated by NLRB and, accordingly, the decision below is clearly correct.*

The petition, in an effort to depict an important question of Federal law, incorrectly attributes a sweeping effect to the decision below. The uncontested facts of this case with respect to bargaining history, prior NLRB unit determinations, prior certification elections and the character of the Union's grievance all contributed to the result below. Special Term distinguished the Baltimore grievance from

---

*If the Union were to insist that the Company bargain with it in respect of both the production and maintenance unit and the disputed group of Engineering Laboratory employees, the Union would clearly be guilty of an unfair labor practice. See *Internat'l Longshoremen's Ass'n*, 118 N. L. R. B. 1418 (1957) and *Douds* v. *Internat'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957). In the *Longshoremen's* situation, NLRB obtained a discretionary injunction under Section 10(j) against ILA for insisting on bargaining beyond a unit. See *Douds* v. *Internat'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957). The intermediate report in the NLRB proceeding, affirmed by the Board, and the District Court decision in the injunctive proceeding, affirmed by the Second Circuit, emphasized that union efforts to bargain beyond the certified unit frustrate NLRB's statutory duty to determine the appropriate unit and that the Board's findings as to an appropriate unit relieve an employer of any duty to deal with any bargaining representative on any other basis. See 118 N. L. R. B. at 1491 and 147 F. Supp. at 111. The Court of Appeals for the District of Columbia, in reviewing the Board's order, stated: "ILA is asking this court to place it in a position to cover employees who have not elected ILA as their bargaining representative. If the employees from Maine to Texas choose ILA, and if the Board shall then certify ILA, it will have gained Board recognition for the industry-wide representation status it seeks. But it is one thing to achieve that status within the ambit of the legislation and another thing to gain it by this court's fiat" (277 F. 2d 681, 682-83). It would indeed be anomalous if the Union were permitted to obtain through arbitration of the Baltimore grievance an objective which would have been illegal for it to seek at the bargaining table and unattainable to it in the courts.

a grievance which "presented only a superficial change of [job] title, with no involvement of the rights of another union, or of other employees, to choose their bargaining agent in accordance with prior certification of respective bargaining units." (Rec. 127, ff 379-80). The Appellate Division, distinguishing between situations "where the question of contract breach is direct and the question of representation is peripheral" stated that "the field is not pre-empted" and based its conclusion that "orderly process is best served and contract principles are not violated by limiting jurisdiction of the issue here to the NLRB" on the particular facts of the Baltimore grievance (*id.* at 142-44, ff 426-30). The Court of Appeals incorporated by reference the conclusions of fact of the Appellate Division and quoted those portions of *Marine Engineers, supra,* which reiterate those aspects of the rationale of the pre-emption doctrine which require deference to NLRB in the present controversy.*

---

*With only a nod to the record, the petition addresses itself, in a footnote (n. 4, p. 11), to the "assumption" that the issues raised by the Baltimore grievance "touch matters which the Board might consider in a certification proceeding before the Board pursuant to Section 9". The footnote finds no obstacle to an order to compel arbitration on this "assumption" because (a) the Act contemplates that employers and unions may agree upon appropriate units for bargaining purposes and (b) such agreements are deferred to by the Board unless inconsistent with statutory policy. The footnote concludes with the proposition that Section 9 does not impose limitations on Section 301, citing (i) *Retail Clerks Internat'l Ass'n* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962) (holding that an employer may not challenge a union's majority status when sued under Section 301 for enforcement of its agreement with the union) and (ii) *United Textile Workers of America* v. *Textile Workers Union of America*, 258 F. 2d 743 (7th Cir. 1958) (holding that a "no raiding" agreement between two unions (and an arbitrator's decision thereunder adverse to the defendant union) is enforceable under 301 even though it obligates defendant to withdraw a Section 9 petition filed with the Board). It is, of course, equally true that Section 301 does not impose limitations on Section 9.

II. THE PETITION SHOWS NO CONFLICT

Dowd Box, supra, held that Section 301 does not deprive state courts of jurisdiction over controversies cognizable thereunder. *Lucas Flour, supra,* another Section 301 case, held that where the arbitration provisions of a collective bargaining agreement cover a given dispute, they implicitly embody an agreement not to strike in respect of the dispute. *Sinclair Refining, supra,* held that, where an employer does not have a right under a collective bargaining agreement to obtain arbitration of its grievance against a union, the employer is entitled to a judicial adjudication of the dispute under Section 301. The underlying disputes in those cases did not involve questions of bargaining representation, appropriate bargaining unit, inter-union rivalry or the rights of employees to choose their own bargaining representative.

The petition asserts conflict with these cases, presumably because *Dowd Box* rejected an argument that Section 301 requires the type of single forum uniformity which is sometimes achieved by limiting jurisdiction over Federal questions to Federal courts (see 368 U. S. at 513), *Lucas Flour,* elaborating on the *Dowd Box* opinion, referred to Taft-Hartley legislative history in which Congress rejected a proposal to make breach of a collective bargaining agreement an unfair labor practice, thereby rejecting the idea that NLRB should police such agreements (see 369 U. S. at 101) and *Sinclair Refining* rejected an extremely farfetched claim of NLRB preemption (see 370 U. S. at 245).

The footnote, referred to above, in the *Lucas Flour* opinion stated that the "preemption" doctrine was inapplicable to that case and cited with approval several lower court decisions which hold that a contract grievance otherwise arbitrable may not be withheld from an arbitrator because

it involves conduct which might also constitute an unfair labor practice under Section 8 of the Act. The decision below is readily distinguishable from those lower court cases. The latter cases hold that the existence of rights and remedies under Section 8 of the Act in respect of any given fact situation does not operate to deprive a party to a collective bargaining agreement of any contract right or remedy he may have thereunder.

The "unfair labor practice" grievance cases do not conflict with the decision below or its rationale. An employer may agree with a union not to discriminate against union members even though the Act also forbids such discrimination. If the employer violates its agreement by discharging employees because of union membership, neither statute nor policy precludes enforcement of the contract right against discrimination or an arbitrator's award of back pay to the injured employees. There is no possibility of conflict with an NLRB decision because, even if the union or the affected employees pursued their statutory remedy, an agency determination that the employer had not discriminated within the meaning of the statute (i) would not be inconsistent with the arbitrator's determination that it had discriminated within the meaning of the contract and (ii) would never give rise to an NLRB order forbidding the employer to make up back pay. In addition, in "unfair labor practice" grievances, no second union is involved, employees' statutory rights are unaffected and ultimate Board action in the situation is highly unlikely.

Far from any conflict, the decision below is in accord with every other decision in which similar issues have been raised. See *Raytheon Co.* v. *Local No. 1505, Internat'l Brotherhood of Electrical Workers*, 304 F. 2d 365 (1st Cir. 1962) (petition for writ of certiorari filed Sept. 6, 1962, No. 419, Oct. Term 1962); *Intern'l Chemical Workers Union, Local 6* v. *Olin Mathieson Chemical Corp.*,

202 F. Supp. 363 (S. D. Ill. 1962); *Retail Clerks* v. *Food Fair Stores*, 48 LRRM 2284 (E. D. Pa. May 3, 1961); *Amperex Electronic Corp.* v. *Rugen*, 284 App. Div. 808, 132 N. Y. S. 2d 93 (2d Dep't 1954); and *Madison Glass Specialty Co., Inc., In re*, N. Y. L. J., July 3, 1961, p. 3 (Sup. Ct. N. Y. Cty.). See also *Klein* v. *Styl-Rite Optics, Inc.*, 8 App. Div. 2d 811, 188 N. Y. S. 2d 421 (1st Dep't 1959) and *Local 459, Intern'l Union of E. R. & M Workers* v. *Remington Rand*, 191 N. Y. S. 2d 876 (Sup. Ct. N. Y. Cty. 1959).*

---

*While the petition is aimed at the "straw man" that the Baltimore grievance is a work assignment dispute under the collective bargaining agreement between the parties, curiously, it makes no reference to those lower court decisions which genuinely did involve the arbitrability of disputes with respect to contract provisions assigning certain work to union members. See *Freight Drivers and Helpers Local 557, Etc.* v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961) with *New York Mailers' Union, Local 6* v. *New York Times*, 43 Lab. Cas. Par. 17, 309, N. Y. L. J. Oct. 28, 1961, p. 12 (Sup. Ct. N. Y. Cty.) and *New York Mailers' Union, Local 6* v. *Publishers' Ass'n of New York City*, 43 Lab. Cas. Par 17, 310, N. Y. L. J. Nov. 28, 1961, p. 13 (Sup. Ct. N. Y. Cty.).

It is equally curious that the petition labors the proposition that NLRB certifications are certifications with respect to units of employees and do not import any assignment of work to any particular employee group (a proposition with which the Company wholeheartedly agrees). The provision of the collective bargaining agreement which the Union claims in the Baltimore grievance to have been violated by the Company is the clause which requires the Company to recognize the Union "for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative" (Pet. App. 28, 31-32). *McDonnell Aircraft Corp.*, 109 N. L. R. B. 930 (1954), so heavily relied on by the Union, held that work assignments may be covered by collective bargaining agreements (and, if so covered in an agreement with an appropriate arbitration clause, disputes with respect to work assignments should be arbitrated rather than brought before the Board under Section 8). *Mc Donnell* seems to the Company to emphasize the fact that an agreement must contain something more than an obligation to recognize a union in respect of the unit for which it has been certified in order to constitute an agreement to assign work to the employees represented by the union.

II. THE EAST PITTSBURGH GRIEVANCE.

The decision below, in response to the mandates of Section 301 as construed by this Court and the express provisions of the collective bargaining agreement between the parties,* addressed itself to the question of whether the East Pittsburgh grievance was "covered by the provisions of the collective bargaining agreement which provided for arbitration" (Pet. App. 20). In doing so, it rejected the Union's contention that all arbitration provisions should be blindly equated with those before this Court in the *Steelworkers'* cases. It accepted the Company's contentions that the collective bargaining agreement between the Company and the Union was not a bargain for industrial peace at any price in exchange for comprehensive arbitrability, but a bargain by which the Company specifically contracted for judicial review of arbitrability in advance of arbitration and the Union specifically bargained for the right to call a strike if the Company should challenge arbitrability. In short, the Court of Appeals found no evidence of a bargain for "therapeutic" arbitration. Proceeding from those conclusions to the nature of the East Pittsburgh grievance and the conclusive evidence in the arbitration provisions of the agreement that "time values" were not to be the subject of arbitration, the Court of Appeals construed the agreement to mean that the Company had not consented to arbitration of the East Pittsburgh grievance.**

---

*Specifically, Section XIV-A C (5) calling for advance judicial determination of arbitrability (Pet. App. 30).

**Judge Fuld, who dissented in respect of the Baltimore grievance, was in accord with the remainder of the Court of Appeals (and the five Justices of the Appellate Division) in the construction of the arbitration provisions of the agreement and their application to the East Pittsburgh grievance.

In its approach to the East Pittsburgh grievance, the Court of Appeals was faithful to the clear mandate of the *Steelworkers* cases, *viz.*, that Federal labor policy:

> (i) specifically rejects compulsory arbitration (except in the transportation industry);
>
> (ii) requires the consent of both parties to any proposed arbitration of an industrial dispute; and
>
> (iii) while favoring broad interpretation of arbitration provisions and collective bargaining agreements, requires that the courts affirmatively determine, as a matter of fair contract interpretation giving effect to the expressed intent of the parties, that such provisions do embody consent to the particular dispute sought to be arbitrated.

The mandate of the *Steelworkers* cases is not only that courts must, under Section 301, limit themselves to determining the intention of the parties with respect to whether any given dispute should be arbitrated but also that the arbitration provisions of each collective bargaining agreement (which range from broad arbitration clauses covering "any dispute", coupled with an unqualified no strike clause, to the more limited provisions found in the agreement between the Company and the Union, coupled with a no strike clause which is specifically inapplicable where arbitration is not available) must be conscientiously interpreted and applied and that no arbitrary rules (such as a requirement that the underlying dispute be bona fide) can be employed by the judiciary.

The Union, unhappy with the interpretation and application by the New York courts of the arbitration provisions of its collective bargaining agreement with the Company in respect of the East Pittsburgh grievance, takes the position

in its petition that this Court should sit to review every lower court interpretation and application of arbitration provisions in collective bargaining agreements wherever the result is against arbitrability, notwithstanding that the lower court have faithfully implemented the principles of the *Steelworkers* cases. In so doing, the Union misreads those cases for they were clearly a mandate to implement contractual intention and not a mandate for mechanical judicial routing of grievances to arbitrators.

Certainly the fact that application of the *Steelworkers'* doctrines to the facts of this case requires denial of arbitrability does not indicate any conflict with *Steelworkers*. The Union suggests no valid reason why this Court should review particular applications of the *Steelworkers'* cases and particular contract interpretations thereunder.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN D. CALHOUN,
Counsel for Respondent,
1 Chase Manhattan Plaza,
New York 5, N. Y.

CRAVATH, SWAINE & MOORE,
JOHN F. HUNT, JR.,
Of Counsel.

November 2, 1962.

APPENDIX A

Additional Provisions of Statute Involved

In addition to Sections of the Labor Management Relations Act, 1947, set forth in Appendix B to the petition, the following Sections of that Act are involved:

SEC. 7.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title. (29 U. S. C. § 157)

SEC. 8(a)(1), (3) and (5).

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
>
> * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of

section 9(a) of this title. (29 U. S. C. § 158(a)(1) (3) and (5), as amended, 29 U. S. C. A. § 158(a) (3) (Supp. 1961)

SEC. 8(b) (3).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of this title. . . . (29 U. S. C. § 158(b) (3))

SEC. 9(a) and (b):

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . (29 U. S. C. § 159(a) and (b))

APPENDIX B

Additional Provisions of the Collective Bargaining Agreement Between the Parties

SECTION VI—STRIKES, STOPPAGES AND LOCKOUTS

A. Subject to the provisions of Section XVIII hereof, the Union and the Locals will not cause or officially sanction their members to cause or take part in any strike (including sit-downs, stay-ins, slow-downs, or any other stoppage of work) during the life of this Agreement. This includes disputes which are within the proper scope of the grievance procedure provided in this Agreement or the applicable local supplement (a) until such grievance procedure has been fully exhausted, and (b) thereafter except as provided in Paragraph B below . . .

. . . When the Company has questioned the arbitrability of a grievance under Section XIV-A subparagraph C.5, the Local shall have the right to strike in support of such grievance, after satisfying condition (c) of this paragraph.

* * * * *

SECTION XIV—SETTLEMENT OF DISPUTES

4. The Union and the Company may consider referring a grievance to arbitration in accordance with Section XIV-A by mutual agreement at any time.

5. Should the parties fail to resolve any grievance subject to arbitration under Section XIV-A after exhausting the grievance procedure at the national level, the provisions of Section XIV-A shall apply.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 14 1963
JOHN F. DAVIS, CLERK

No. 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway
New York 36, N.Y.
Of Counsel.

TABLE OF CASES

	Page
Carey v. *General Electric Co.*, D.C. S.D. N.Y., No. 61-3636, April 19, 1962, 50 LRRM 2119	2
Proctor and Gamble Independent Union v. *Proctor and Gamble*, 51 LRRM 2752 (C.A. 2, No. 61, Dec. 10, 1962)	2
Smith v. *Evening News Association*, 371 U.S. 195	2
Steelworkers v. *General Electric Co.*, D.C. N.D. Ohio, No. 37415, Nov. 30, 1962, 51 LRRM 2531	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 485

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Since the filing of the petition for writ of certiorari herein, two events occurred which provide further reason for the grant of the petition.

1. On February 1, 1963, a motion to vacate was filed by the petitioner in No. 419, *Local Lodge No. 1836, IAM* v. *Local No. 1505, IBEW*, on the ground that a settlement had been reached in the pending action. The issue in that case, in which certiorari was granted, is identical to the first issue in the instant case. In the event that the motion to vacate is granted in the *Local Lodge No. 1836* case, additional reason would exist to grant the petition for certiorari in the instant case, as the Court has already deemed the issue raised herein appropriate for its consideration, and the in-

stant case will become the only pending vehicle for its consideration.

2. The decision of this Court in *Smith* v. *Evening News Association*, 371 U.S. 195, decided December 10, 1962, confirms that the decision of the New York Court of Appeals below is in conflict with the preemption decisions of this Court. The authority of the Board to deal with matters over which it has jurisdiction which also violate collective bargaining contracts "is not exclusive and does not destroy the jurisdiction of the courts under §301." 371 U.S., at 197. See also *Proctor and Gamble Independent Union* v. *Proctor and Gamble*, 51 LRRM 2752, 2755 (C.A. 2) No. 61, Dec. 10, 1962).

Indeed, as the decision of the Court below was based on preemption (Se Appendix A to Petition p. 21), it is now clear that it was in error.[1]

---

[1] The deviation of the Court below from the principles of the *Steelworkers* decisions in connection with the second issue raised in the petition for writ of certiorari is also clear. More is involved than a mere difference in opinion over the application of the *Steelworkers'* doctrines to particular contract language. The decision below departs from the mandate of this Court to narrowly confine its area of inquiry and deny arbitration only when "the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." 363 U.S., at 583. In addition to cases cited in the petition at pp. 16-17, see also *Steelworkers* v. *General Electric Co., D.C. N.D. Ohio*, No. 37415, Nov. 30, 1962, 51 LRRM 2531, 2534; *Carey* v. *General Electric Co.*, D.C. S.D. NY., No. 61-3636, April 19, 1962, 50 LRRM 2119, 2128-2130.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway
New York 36, N.Y.
Of Counsel.

(5934-5)

LIBRARY
SUPREME COURT, U. S.

No. 21

Office-Supreme Court, U.S.
FILED
MAR 20 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway,
New York 36, N.Y.
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 485

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

On March 11, 1963, after Petitioner's prior Memorandum herein was filed, the United States Court of Appeals for the Second Circuit announced its decision in *Carey* v. *General Electric*, — F. 2d —, (Appendix, pp. 5-26). That opinion is in conflict with the decision of New York Court of Appeals in the instant case with respect to both issues raised by the petition for certiorari herein and constitutes further cause to grant the petition.

Part III of the opinion of the Second Circuit (Appendix, pp. 18-24) deals with the first issue raised in the petition for certiorari. Some of the grievances as to which the court in that case was asked to compel arbitration were identical to the Baltimore grievance sought to be arbitrated in this case. (Petition for certiorari, pp. 4-5; 7-12). The defenses raised to resist arbitration were identical to those raised in this

case. In a carefully drawn analysis the court rejected them, holding:

(1) "The Supreme Court has all but sounded the death-knell on the theory of exclusive jurisdiction in cases arising under section 301 of the Labor Management Relations Act" (Appendix, p. 19).

(2) "The strong emphasis placed upon arbitration as a means of peacefully and expeditiously resolving labor disputes in the drafting of Section 301 and in its interpretation by the Supreme Court, . . . might be immeasurably frustrated were it within the power of a recalcitrant party to assert that his conduct which is alleged to be in breach of contract would be also an unfair labor practice and within the sole domain of the NLRB; almost any breach of a collective bargaining agreement could successfully be garbed as an unfair labor practice." (Appendix, p. 20).

(3) "The fear of possible conflict with the NLRB can easily be exaggerated," and "Rather than clash, the private interests advanced in the arbitral forum, are far more likely to be complimentary." (Appendix, p. 21).

(4) "[T]he possibility of some form of future conflict between the arbitrator's interpretation and a finding by the National Labor Relations Board in the area of representational disputes is [not] so much more unsettling than in other areas as to call for a different result." (Appendix, p. 23).

(5) "Although the ideal solution of this grievance would bring both conflicting unions before a single tribunal, . . . arbitration between one of them and

the employer may nonetheless be a force for industrial peace." (Appendix, p. 24).

Part II of the opinion of the Second Circuit in *Carey* v. *General Electric* (Appendix, pp. 11-18) is also in conflict with the decision of the court below herein with respect to the second issue raised in the petition for writ of certiorari. (Petition, pp. 5-7; 13-17) There, the Court held that an exclusionary clause similar to the clause on which the Company relied below is at worst ambiguous, and that in order to exclude arbitration the exclusion from arbitration must be clear and unambiguous. Moreover, there, as here, looking to the agreement as a whole, the ambiguities could be readily resolved to establish that the disputed exclusion limited the award-making authority of the arbitration, but not his jurisdiction. There, as here, the reading of the clause as limiting the arbitrator's award-making authority did not render the clause "ineffectual and meaningless," contrary to the holding of the court below that to submit a grievance to arbitration under these circumstances would be "an idle gesture."

The decision of the Court of Appeals discloses a clear conflict between the highest State Court in New York and the highest Federal Court in New York over the role of the courts in suits to compel arbitration, and the scope to be given arbitration agreements.

As the law to be applied in both the state and federal courts is federal law (*Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95), the existence of the conflict between these courts constitutes compelling reason to grant the petition for writ of certiorari so that the law will be uniform in all New York courts.

Indeed, with respect to both issues, the decision of the

Court of Appeals for the Second Circuit now makes it sufficiently clear that reversal of the decision below is warranted so that this Court should grant the petition and reverse the court below without further briefs or argument, and avoid further postponement of the arbitration of the grievances which gave rise to this action.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway,
New York 36, N.Y.
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 222—October Term, 1962

(Argued January 23, 1963 Decided March 11, 1963)

Docket No. 27652

In the Matter of

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO, *Appellee*,

v.

GENERAL ELECTRIC COMPANY, *Appellant*

Before: FRIENDLY, KAUFMAN and MARSHALL, *Circuit Judges.*

Cross appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, J., submitting to arbitration certain grievances under a collective bargaining agreement.

Order modified: all grievances to be submitted to arbitration.

DAVID L. BENETAR, of Nordlinger, Riegelman, Benetar & Charney, New York, N. Y. (Thomas F. Hilbert, Jr., H. H. Nordlinger, Robert C. Isaacs, of counsel), *for appellant.*

LIEBERMAN, KATZ & ARONSON, New York, N. Y., and Benjamin C. Sigal, Washington, D. C. (Isadore Katz, on the brief), *for appellee.*

KAUFMAN, *Circuit Judge*:

This case comes before us on cross appeals from the disposition by Judge Palmieri, in the United States District Court for the Southern District of New York, of a petition to compel arbitration of twelve labor grievances. The International Union of Electrical, Radio and Machine

Workers, AFL-CIO, through its president, James B. Carey, instituted this proceeding in the New York Supreme Court, and the defendant, General Electric Company, elected to remove the case to the District Court by invoking section 301(a) of the Labor-Management Relations Act, 29 U. S. C. § 185. See 28 U. S. C. §§ 1441, 1446. The grievances in question arise under the collective bargaining agreement between General Electric and the union, as well as certain local supplement agreements controlling in various plants throughout the country. Over the employer's objections that these grievances were without the jurisdiction of the arbitrator for several reasons—failure to comply with procedural conditions precedent, express exclusion from arbitration in the collective agreement, conflict with the exclusive jurisdiction of the National Labor Relations Board—Judge Palmieri, in a thorough opinion, ordered that the merits of all grievances except one be submitted for determination to the arbitrator. General Electric Company, hereafter referred to as the employer, asserts that Judge Palmieri erred in submitting any issues to arbitration; the union, in its cross appeal, asserts that he erred in withholding the one grievance from arbitration.

We modify and affirm the order of the District Court on the appeal of General Electric, and reverse the ruling of the court on the union's cross appeal.

I

We shall first dispose of those objections to arbitration which rest upon the assertion that the union or the grieving employee failed to take timely action as stipulated in the collective bargaining agreement. Article XIII of the collective agreement establishes a three-step grievance procedure for the peaceful resolution of individual grievances. It provides that a grieving employee, within a reasonable time after the occurrence or knowledge of the aggrieving condition, may complain of it to his foreman or other immediate supervisor. If unresolved, the grievance may be carried to the second stage, presentation by a local union official to a representative of local management. If no settlement is reached after step two, the grievance may be

referred by union "headquarters", the National Officers, to management "headquarters," an Executive Officer of the company. The collective bargaining agreement further provides that the step-three submission to the company shall be made "not more than three months after the completion of discussions and the final decision of local Management at Step Two."

The relevant portions of the arbitration provisions (Article XV) stipulate that "any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII, and which involves * * * the interpretation or application of a provision of this Agreement * * * shall be submitted to arbitration, upon written request of either the Union or the Company, provided such request is made within 30 days" after a step-three decision by the company officials. Article XV-2(a) continues, "Within 10 days following a written request for arbitration of a grievance, the Company or the Union may request the American Arbitration Association to submit a Panel of names from which an arbitrator may be chosen."

The employer contends that two grievances—National Docket Nos. 4910 and 4928, both involving an employee's assertion that he has rightful claim to a position presently occupied by a junior employee—have been rendered non-arbitrable because not presented by the employee "within a reasonable time after the occurrence or knowledge of the situation * * *". The employer alleges that four and two years, respectively, transpired between the occurrence of the events complained of and the presentation of the grievance. The union answers that the presentation was timely in each case, because the senior employee did not know of the aggrieving condition for the extended time period in question and because each filed his grievance immediately upon learning of it.

Two other grievances—National Docket Nos. 3970 and 3971, consolidated as one in the union's petition to compel arbitration—spring from the laying off of two individuals whom the company refused to recognize any longer as stewards after it placed two groups of employees under a single foreman. The company claims that these griev-

ances have been rendered nonarbitrable by the union's failure to comply with step three of the grievance procedure, which as we have seen requires reference to company headquarters within three months after a step-two decision by local management. The union justifies its non-compliance with the three month provision on the ground that resolution of the identical substantive issue was then pending in another arbitration proceeding; this, claims the union, was sufficient to warrant abeyance of the grievance procedure here.

Of seven grievances,[1] the employer contends that the union failed timely to request a panel from the American Arbitration Association within ten days from the date of a written request for arbitration. The union seeks to justify the untimely request by the fact, *inter alia*, that the Association will automatically and without request submit a list of potential panel members for the arbitral tribunal. The union also asserts that the ten-day limitation was merely permissive and was not a mandatory condition precedent to arbitration, and that the provision has been effectively ignored for many years.

Judge Palmieri, noting the split of authority on whether compliance with purported conditions precedent was to be determined by the court or by the arbitrator, held that questions of "procedural arbitrability" requiring some special expertise or familiarity with plant conditions and practices would be determined by the arbitrator, but reserved for the courts "questions that do not call for this special competence, as, for example, where the contract provides in specific rather than general terms the procedural requirements and the consequences of 'non-compliance.'" He accordingly submitted to arbitration the questions whether an employee had presented his grievance "within a reasonable time" after occurrence or knowledge thereof, and whether the union's delinquency in invoking step three of

---

[1] National Docket Nos. 4454, 4601-11, 4665, 4910, 4922, 4928, 5039. No. 4454 protests the assignment of apprentices to jobs of laid-off craft helpers. The facts of the remaining six grievances are set out in other parts of this opinion.

the grievance procedure was excused by the pendency of arbitration proceedings. He reserved for himself the question whther the union's failure to request an arbitration panel was rendered immaterial by the automatic furnishing of such a list by the American Arbitration Association. He answered the question in the affirmative, and finding no procedural impediment to arbitration of the seven grievances involved, ordered that they be submitted to arbitration.

At the time of Judge Palmieri's decision, this Court had been silent on the question of procedural arbitrability. Our silence on this difficult problem in labor law has since been broken by the clear and positive language of *Livingston* v. *John Wiley & Sons, Inc.*, — F. 2d — (2d Cir. Jan. 11, 1963). Holding that the question of compliance with conditions precedent was a matter solely for the arbitrator to decide, Judge Medina, speaking for a unanimous court, noted that

> "It is of the essence of arbitration that it be speedy and that the source of friction between the parties be promptly eliminated • • •. The numerous cases involving a great variety of procedural niceties • • • make it abundantly clear that, were we to decide that procedural questions under an arbitration clause of a collective bargaining agreement are for the court, we would open the door wide to all sorts of technical obstructionism."

The Court continued:

> "It is for this reason that we cannot agree to the distinction propounded by Judge Palmieri in his very excellent discussion in *Carey* v. *General Electric Co.* • • • between matters of procedural compliance requiring the expertise of the arbitrator for decision and those which the courts are capable of deciding on their own. If the court must first decide whether a particular procedural problem calls for the special abilities and knowledge of an arbitrator, there will be inevitable delay. Such a practice, if followed, would develop a

whole new body of decisional law, with the usual distinctions and refinements. Moreover, we have serious doubts that the suggested distinction between different types of procedural questions arising out of the arbitration clauses in collective bargaining agreements can be placed upon any tenable and rational basis. In any event, it is clear that the practical consequences of attempts by the courts to apply such a distinction would be delay and prejudice to the speedy and effective arbitration which we believe the national policy calls for."

We need add little to what has already been said in the *Livingston* case. The difficulties involved in the dichotomy suggested by Judge Palmieri are clearly evident in the very case before us. Even were we to assume that contract conditions precedent could, on their face, be divided into those whose terminology is open-ended, warranting the arbitrator's special competence for interpretation, and those well-defined provisions meet for judicial interpretation, we would often have to go further, and characterize the union's reasons for non-compliance. Thus, it was determined below that the three-month provision involved in National Docket Nos. 3970 and 3971 was specific, but that the union's defense of pending proceedings "requires a consideration of factors more appropriate for the arbitrator." If the court must characterize not only the contract provision asserted to be a condition precedent but also each of the union's justifications or excuses for untimeliness, the arbitral wheels would very soon grind to a halt.

As noted in *Livingston*, the underlying premise behind Judge Palmieri's scheme of characterization is also subject to question; for what is a "specific" contract term? If, as an illustration, an employee must take certain action "within five days," does this not raise the question whether the parties to the collective bargaining agreement intended that the measuring rod be working days rather than calendar days; or, whether the period was intended to be tolled for certain occurrences, such as a strike; or, whether the five-

day restriction was illusory under any circumstances, because customarily ignored in the plant?

We therefore affirm that portion of Judge Palmieri's order which submitted to arbitration the "procedural" aspects of Docket Nos. 4910, 4928, 3970, 3971, reverse that portion of his order holding that the union was excused from making a timely request for a panel of arbitrators, and order that the latter question be submitted to the arbitrator for decision.

II

The company's second attack upon the union's attempt to secure arbitration employs as its weapon Article XV-3(b) of the collective bargaining agreement, which the company asserts excludes from arbitration six of the union's grievances. The specific facts of the grievances in question, to be recited below, make it quite clear that they fall within the broad language of Article XV-1(a): "Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII [the three-step grievance procedure], and which involves * * * the interpretation or application of a provision of this Agreement * * * shall be submitted to arbitration upon written request of either the Union or the Company. * * *." Although conceding, for the most part, that the grievances under discussion fall *prima facie* within the "interpretation or application" clause,[2] the company claims that arbitration is barred by the language which follows soon after, in Article XV-3(b):

> "It is specifically agreed that no arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification or authority to decide the appropriate classification of any employee. Subject to the foregoing limitations on the

[2] The company objects to arbitration of National Docket No. 3830 as not involving the interpretation or application of a contract provision, and to arbitration of National Docket No. 4485 as involving a matter within the sole authority of the company. We reject these contentions for the reasons set out in Judge Palmieri's opinion.

authority of an arbitrator, nothing in this subsection (b) shall prevent arbitration of a grievance involving a violation of this Agreement."

National Docket No. 3830 protests the company's action in reducing the pay rate of two employees. The union claims that these employees, who had been classified as R-17 Millwrights for approximately nine years, temporarily worked in a lower classification during a heavy layoff. Thereafter, when they returned to perform the duties they had originally performed as Millwrights, they were classified merely as Machine Repairmen R-12, and paid at a lower rate. The company asserts that resolution of this grievance would require the arbitrator to determine proper wages and job classifications.

National Docket No. 4485 involves a refusal by the company to reinstate an employee as a sheet metal worker, despite his seniority rights, on the ground that he was physically unable to perform the work. The union alleges that the employee, who had worked as a sheet metal worker for approximately eight months, was laid off because of lack of work; when other employees with less seniority were recalled, he was told that he could not be placed in his former job because of his physical condition. The employee had been examined by the company's dispensary and found to be epileptic. His reclassification was effected apparently on the basis of a provision in the collective bargaining agreement: "An employee with a physical limitation as determined by the Company Dispensary will be transferred to a suitable available classification * * *." The company contends that arbitral review of its action here would require the arbitrator to determine proper job classification.

National Docket No. 4557 protests the promotion of an employee, one Haslam, to an R-14 opening despite the claim to the job by another employee, Hatch, who, the union contends, had greater seniority rights. Haslam, at one time employed within the bargaining unit represented by the union, was transferred to another job, outside the unit. The union contends that upon returning to the unit he was improperly given seniority credit, despite his shift to

a position outside the unit and despite the fact that the job he had previously held in the unit was no longer in existence. The company claims, *inter alia*, that to resolve this grievance, the arbitrator would have to determine the proper classification of an employee.

National Docket No. 4665 involves the company's hiring of employees as No. 1762 Testmen, which carried an R-19 classification, but paying them merely R-16 rates. The union claims that the company's continued refusal to advance their wages runs afoul of the collective bargaining agreement, especially the progression schedules. The company defends its refusal to arbitrate by asserting that the arbitrator is without authority to establish or modify job classifications or wages, or to determine the approximate classification of an employee.

National Docket No. 4922 protests the removal of employees from the production and maintenance unit, represented by the union, and the conversion of their jobs from hourly pay to salary without any change in their duties. It is alleged that the company's removal of the No. 8323 Crystal Processors, R-10, violated that section of the collective bargaining agreement providing for union recognition, as well as other contract provisions, and that several of the employees were later laid off in violation of their rights. The company objects to arbitration as necessarily involving the decision of appropriate job classifications.

National Docket No. 5039 involves an allegation of improper retroactive deductions from the earnings of sixteen employees who were transferred to experimental jobs. When two employees complained that their earnings on the experimental job were less than their average earnings on their regular job, the company paid them the difference. Thereafter, the company recomputed the wages of twenty-three other employees on the experimental job and found that sixteen had been earning more on that job than their average earnings on their regular job. The excess earnings were thereupon deducted from later pay checks. The grievance complains of these retroactive deductions. The company asserts that the grievance is nonarbitrable, for the arbitrator is without authority to modify wages.

The scope of our power in determining questions of "substantive arbitrability," that is, whether the subject matter of a grievance is such as to make it properly submissible to arbitration under the agreement of the parties," has been clearly set out by the Supreme Court. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582-83 (1960). "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." Ibid. at 584-85. We have before us such a broad arbitration clause, bringing within its ambit all cases involving "the interpretation or application of a provision of this Agreement . . . "[3]

Although the company asserts that all six grievances just described are rendered beyond the jurisdiction of the arbitrator by Article XV-3(b), the union contends that the limitations there set out upon the authority of the arbitrator do not deprive him of jurisdiction but merely circumscribe his award-making powers by restricting the remedies which he may fashion after deciding the merits of a grievance. We agree, as did Judge Palmieri, with the union's construction of the so-called exclusionary clause, and we

---

[3] This Court, recently construing precisely such a clause, said:

> "The nub of the matter is that under the broad and comprehensive standard labor arbitration clause every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement."

Procter & Gamble Independent Union v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644, 645-46 (2d Cir. 1962).

hold therefore that none of these grievances is excluded from arbitration by virtue of its substantive nature. This conclusion is compelled by the structure of the section itself, a comparison with other provisions in the collective bargaining agreement, and an understanding of the arbitration clause in the context of labor relations between the union and the employer.

The first sentence of Article XV-3(b) limits the "authority" of the arbitrator; the second provides that subject to these limitations, all grievances involving a violation of the collective bargaining agreement are to be arbitrable. The more plausible reading of the Article on its face is therefore that all grievances involving "interpretation or application" are within the *jurisdiction* of the arbitrator, but that the arbitrator's jurisdiction must be exercised subject to the stipulated limitations upon his award-making *authority*. At the worst, this Article is ambiguous; but as we have just noted, in order that arbitration be excluded, the exclusionary clause must be "clear and unambiguous."

Any ambiguities are readily dissipated by an examination of the subsections of Article XV which surround the subsection under investigation. Article XV-3(c) states that "no provision of this Agreement * * *shall be subject to arbitration* pertaining in any way to the establishment, administration, interpretation or application of Insurance or Pension Plans * * *." (Emphasis added.) It is clear that the parties were quite able, by the use of appropriate language, to provide for exclusion from arbitration altogether by withdrawing from the arbitrator's jurisdiction certain specific subject matter. The use of different phraseology within the very same Article of the collective bargaining agreement cannot be ignored in the process of construction.[4] Article XV-3(a), on the other hand, uses

---

[4] We note at this point that the cases upon which the company relies in asserting that Article XV-3(b) renders these grievances wholly nonarbitrable are cases where the exclusionary language left no doubt that arbitration was meant to be completely foreclosed. See *Communications Workers of America* v. *New York Tel. Co.*, 46 CCH Lab. Cas. ¶ 17,859 (S. D. N. Y. 1962) ("In no event shall any grievance or dispute arising out of this Section * * * be subject to the arbitration provisions of this agree-

terminology simliar to that of the section here under investigation: "no arbitrator shall have any authority to add to, detract from, or in any way alter the provisions of this Agreement." This provision seems clearly to be a limitation upon the arbitrator's award-making powers, for it apparently assumes that a dispute will indeed be submitted to him. The use here of the word "authority" guides us toward a similar interpretation when it appears in the very next subsection of Article XV.

Finally, we are persuaded that Article XV-3(b) does not deprive the arbitrator of jurisdiction over these six grievances, because of the broad possibility of labor dislocation which would result from such a construction. All of the grievances under discussion are what we have called "the-run-of-the-mill, garden variety of grievances commonly presented for solution by the procedures of arbitration in the modern Amer an industrial world. * * *" *Procter & Gamble Independe. Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644, 645 (2d Cir. 1962). To hold that such grievances were meant to be excluded from the broad arbitration provision would remove the possibility of compelled peaceful resolution of the type of grievance so pervasive today. We therefore endorse the conclusions of Judge Palmieri, — F. Supp. at —.

We do not say that labor and management are no longer free to retain the strike as a means of settling industrial disputes or to limit the scope of arbitration to a minimal number of issues in the collective bargaining agreement. We have recently emphasized that arbitration is not an incident of the employment relationship, but is a creature of contract between the union and the employer. See *Black-Clawson Co.* v. *International Ass'n of Machinists,*

---

ment."); *Underwood Corp.* v. *Local 267, International Union of Elec. Workers*, 183 F. Supp. 205 (D. Conn. 1960) (Clark, Circuit Judge, sitting by designation) ("There may not go beyond Step 3 of the grievance procedure to arbitration any difference * * * arising under any provision of Section 16 * * *."). *But see Sunnyvale Westinghouse Salaried Employees Assn.* v. *Westinghouse Elec. Corp.*, 175 F. Supp. 685 (W. D. Pa. 1959), aff'd 276 F. 2d 927 (3rd Cir. 1960), the authority of which is considerably weakened by *Radio Corp. of America* v. *Association of Professional Eng'r Personnel*, 291 F. 2d 105 (3d Cir.), cert. denied, 368 U. S. 898 (1961).

— F. 2d — (2d Cir. 1962); *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, — F. 2d — (2d Cir. 1962). What we do say is that the canons for construing labor agreements, as set down by the Supreme Court, require that such a broad-reaching exclusion as is urged by the company should be garbed in unmistakably clear language.

The company urges that our reading of the clause limiting the arbitrator's powers renders that clause ineffectual and meaningless. We do not agree. The clause was obviously designed to prevent the arbitrator from making the type of decision which is normally reserved for the parties at the bargaining table. Thus, the arbitrator cannot establish wage rates or job classifications where none existed before and cannot modify those rates and classifications which have been hammered out at the bargaining table. Nor can he assign an unclassified employee to a particular job classification. Such remedies partake more of "legislation" than adjudication, and our reading of the limiting clause merely gives effect to the parties' apparent intention to restrain the arbitrator from exercising a legislative function. The employer argues that the arbitrator necessarily "establishes or modifies" a wage rate or job classification whenever he declares improper some wage or job decision of the employer; in short, that there is an unauthorized "modification" whenever the arbitrator suggests a change in the status quo. We cannot adopt such a construction of the limiting clause. If a change in the status quo is necessitated by an interpretation of the collective bargaining agreement, then it is not an unauthorized modification. The employer's construction of a similar provision was recently rejected by the Court of Appeals for the Third Circuit in *Radio Corp. of America* v. *Association of Professional Eng'r Personnel*, 291 F. 2d 105, 109 (3d Cir.), cert. denied, 368 U. S. 898 (1961),[5] and *International Union of Elec.*

[5] "The arbitrator's ruling on this dispute as to the amount of merit increases would thus merely enforce a contractual scheme of escalation. Certainly, if a contract provided for a wage increase of 5% at the end of a year and the employer granted only a 4% increase at that time, an award of the difference could not be characterized as action changing an existing wage rate or establishing a new one."

Workers v. *Westinghouse Elec. Corp.*, 268 F. 2d 352, 355 (3d Cir. 1959).[8]

Even were we to agree with the employer's contention that certain of the grievances might result in an unauthorized "decision" as to the "appropriate classification of any employee," we do not deem that proper cause for interceding at this point. Arbitration may well contribute to industrial peace even if it results in the arbitrator's determination that he can make no valid award because of the limitations upon his authority, or that the employee has no case on the merits. In *United Steel Workers* v. *American Mfg. Co.*, 363 U. S. 564 (1960), the Supreme Court submitted to arbitration a grievance which was asserted by the employer to be clearly frivolous; one factor in its decision was the "therapeutic" value which arbitration might have in the "plant environment." See 363 U. S. at 568. We cannot divine now, nor do we deem it proper to predict, the precise form in which the arbitrator will frame his decree. We merely hold that in each of the grievances under discussion, he has the jurisdiction to reach a decision on the merits. Should his decision or the remedy exceed the bounds of his authority as established by the collective bargaining agreement, that abuse of authority is remediable in an action to vacate the award. See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). That question "is for another day." *International Ass'n of Machinists* v. *Hayes Corp.*, 296 F. 2d 238, 244 (5th Cir. 1961).

III

Three of the union's grievances charge conduct on the part of the employer which the employer asserts can be evaluated only by the National Labor Relations Board. It is therefore argued that exclusive jurisdiction in the Board precludes adjudication or arbitration of the grievances,

---

[8] "In reaching these conclusions the arbitrator would neither be establishing new time values or modifying the present ones. He would be merely declaring what the particular actual time value situations are by correct interpretation of the existing written collective bargaining agreement."

under the so-called preemption doctrine. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953). Judge Palmieri found the preemption doctrine inapplicable and ordered arbitration of each grievance. We agree, and affirm the relevant portion of his order.

National Docket No. 4114 protests the assignment of certain bargaining unit work, assembly work on military guidance systems, to "laboratory technicians," persons outside the bargaining unit. The laboratory technicians did the assembly work alongside of employees who were within the bargaining unit, and it is asserted that the company refused to apply to them the provisions of the collective bargaining agreement and to recognize the union as their bargaining representative.

National Docket Nos. 4606-4611, consolidated as a single grievance, involves the assignment of work normally performed by the Maintenance Plumbers' employees within the union's bargaining unit, to empolyees in a different unit represented by a different union.

National Docket No. 4922, already discussed in detail, protests the removal of certain crystal processors from the production and maintenance unit and the conversion of their jobs from hourly pay to salary, without any change in their duties.

The Supreme Court has all but sounded the death-knell of the theory of exclusive NLRB jurisdiction in cases arising under section 301 of the Labor-Management Relations Act. See *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 245 n. 5 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 101 n. 9 (1962); *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 513 (1962). The Court, in *Smith* v. *Evening News Ass'n*, 371 U. S., at 197, discussed the other three cases cited above:

> " . . . in these cases, the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the Labor Management Relations Act and therefore

> within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the preemption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301."

The strong emphasis, placed upon arbitration as a means of peacefully and expeditiously resolving labor disputes, in the drafting of section 301 and in its interpretation by the Supreme Court, see e.g., *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960), might be immeasurably frustrated were it within the power of a recalcitrant party to assert that his conduct which is alleged to be in breach of contract would be also an unfair labor practice and within the sole domain of the NLRB; almost any breach of a collective bargaining agreement could successively be garbed as an unfair labor practice. See Sovern, "Section 301 and the Primary Jurisdiction of the NLRB", 76 Harv. L. Rev. 529, 552 (1963). Congress, in refusing to make all breaches of labor contracts cognizable by the Board as unfair labor practices, see H. R. Rep. No. 510, 80th Cong., 1st Sess. 41-42, 52 (1947), contemplated that these would be resolved by the "usual processes of the law." The fact that the Board's docket is notoriously overcrowded and that Board decisions are often slow in coming, that the remedies which the Board may fashion are often inflexible,[7] that time limitations or jurisdictional restrictions may effectively eliminate the possibility of administrative action, and that the grant of a hearing in any event is wholly

---

[7] See Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems," 57 Colum. L. Rev. 52, 68-72 (1957).

within the discretion of the General Counsel of the Board—all of these factors are incompatible with an assertion that courts or arbitrators must necessarily be deprived of jurisdiction over disputes which in some form or other trench upon the possible, but as yet unexercised, use of power by the National Labor Relations Board. See *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467 (5th Cir.), cert. denied, 358 U.S. 880 (1958); Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems", 57 Colum. L. Rev. 52 (1957); Meltzer, "The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II", 59 Colum. L. Rev. 269, 281-95 (1959); Sovern, *supra*.[8]

The fear of possible conflict with the NRLB can easily be exaggerated. The arbitrator himself might reject an interpretation of the contract which would permit the company to do or force it to do what the Board would enjoin. It is also clear that the mere rendition of an arbitration award in no way precludes the Board from exercising jurisdiction over the same subject matter upon the filing of a complaint alleging an unfair labor practice.[9] Moreover, the Board has exercised its discretion so as to forestall the possibility of abrasive conflicts between itself and the agencies responsible for the enforcement of section 301. Although not bound by the arbitrator's award, the Board will often defer to an award already rendered unless the arbitration procedure has been unfair or irregular, or the arbitrator's decision is repugnant to the purpose and policies

---

[8] See also *United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352 (10th Cir. 1950); *United Elec. Workers* v. *Worthington Corp.*, 236 F. 2d 364 (1st Cir. 1956); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956); *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529 (4th Cir. 1951); Note, 59 Colum. L. Rev. 153, 168-71 (1959); Note, 69 Harv. L. Rev. 725 (1956).

[9] The Board's power to define and prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." 29 U.S.C. § 160(a), section 10(a) of the Labor-Management Relations Act. See *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d at 473; *United Elec. Workers* v. *Worthington Corp.*, 236 F. 2d at 367-68.

of the labor act. See *International Harvester Co.*, 138 N.L.R.B. No. 88 (1962);[10] *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). And where arbitration is an available, but as yet unutilized, remedy for the resolution of problems arguably within the domain of the Board, that agency may choose not to exercise its jurisdiction until the contractual remedies have been exhausted. See *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930, 934-35 (1954); *Crown Zellerbach Corp.*, 95 N.L.R.B. 753 (1951); *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706 (1943), enforced as modified, 141 F. 2d 785 (9th Cir. 1944). See also Dunau, 57 Colum. L. Rev. at 59-64; Wollett, "The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?" 10 Lab. L. J. 477 (1959); Levitt, "Interrelationships in the Interpretation of Collective Bargaining Agreements," 10 Lab. L. J. 484 (1959). In short, the virtues of "coordinate" jurisdiction of the court, the arbitrator, and the Board far outweigh the projected, and practically infrequent, vices. Rather than clash, the private interests advanced in the arbitral forum and the public interest advanced in the administrative forum, are far more likely to be complementary.

The company asserts that even if the preemption doctrine is not generally applicable in cases under section 301, the doctrine should apply where the questions raised by the grievances deal with the scope of the bargaining unit and similar matters of employee representation. It is true that only the Board can conclusively define the scope of the bargaining unit, just as the Board is the authority for the definition of unfair labor practices. But an arbitrator, in

---

[10] "If complete effectuation of the federal policy [favoring arbitration] is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act."

determining whether a party has violated the collective bargaining agreement, does not define an unfair labor practice; nor need he necessarily, in construing the employer's contractual obligation to recognize the union as the bargaining agent in the unit delineated by the Board, define that unit or alter its scope. The grievances under examination, and the contract provisions which will have to be interpreted in the course of arbitration, are quite familiar in the context of work-assignment disputes. See, e.g., *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962); *International Tel. & Tel. Corp.* v. *Local 400, Int'l Union of Elec. Workers*, 286 F. 2d 329 (3d Cir. 1960). We are not persuaded that the possibility of some form of future conflict between the arbitrator's interpretation and a finding by the National Labor Relations Board in the area of representational disputes is so much more unsettling than in other areas as to call for a different result.[11]

In short, we hold that the possibility *vel non* of an exercise of jurisdiction by the Board is irrelevant in the circumstances before us. It was therefore unnecessary for Judge Palmieri to examine the merits of one of the grievances, National Docket Nos. 4606-4611, in order to determine whether the NLRB could be seised of jurisdiction over the purported jurisdictional dispute. It was not beside the point, however, for him to note that the only way the Board's jurisdiction could have been invoked was for the union to engage in an unfair labor practice proscribed by section 8(b)(4)(D); this simply points up the need for a peaceful, channelized, and expeditious means of settling work-assignment disputes, one which is not dependent upon the commission of unlawful acts and upon an often slow-footed exercise of discretion by an already burdened ad-

[11] We are confirmed in our conclusion by the fact that Congress, in section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, has expressly carved out an exception to the purported exclusive jurisdiction of the NLRB by permitting the courts to adjudicate suits against unions for violations of section 8(b)(4) of the act, 29 U.S.C. § 158(b)(4)(D). The latter section imposes restrictions upon the union's power in the area of work assignment disputes, among other activities.

ministrative agency. Although the ideal solution of this grievance would bring both conflicting unions before a single tribunal, see Sovern, 76 Harv. L. Rev. at 573-77, arbitration between one of them and the employer may nonetheless be a force for industrial peace.[12]

IV

Judge Palmieri refused to direct the arbitration of National Docket No. 4557, reasoning that the clause of the collective bargaining agreement upon which it was founded is unlawful, and that to direct the employer to submit to arbitration would in effect compel the commission of an unfair labor practice. The union, on cross appeal, challenges the propriety of this phase of the district judge's order. National Docket No. 4557, as already noted, involves an assertion by employee Hatch that employee Haslam was improperly appointed to a vacancy to which he, Hatch, had prior claim because of seniority. The union asserts that by giving Haslam seniority, the employer has run

---

[12] See *Freight Drivers & Helpers* v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass 1961). Although we disagree with the broad language of the Court of Appeals for the First Circuit, in *Local 1505, Int'l Bhd. of Elec. Workers* v. *Local 1836, Int'l Ass'n of Machinists*, 304 F. 2d 365 (1st Cir. 1962), cert. granted, 31 U.S. L. Week 3171 (U.S. Nov. 19, 1962), that Court noted that "resolution of an ambiguity in its certification is a matter exclusively for the Board in spite of the fact that preemption, as such, does not apply to actions under section 301 * * *."; of situations such as that before us, where the certification is unambiguous, the Court expressly reserved decision. See 304 F. 2d at 367 n. 2, 368. We have learned that counsel in that case have entered into a settlement agreement, requesting that the Supreme Court remand the case and order that the complaint be dismissed. Other decisions arguably contrary to that we reach here have come only from the District Courts. See *International Chem. Workers Union* v. *Olin Mathieson Chem. Corp.*, 202 F. Supp. 363 (S. D. Ill. 1962); *Local 1357, Retail Clerks Int'l Ass'n* v. *Food Fair Stores, Inc.* 202 F. Supp. 322 (E. D. Pa. 1961); *In re American Buslines, Inc.*, 151 F. Supp. 877 (D. Neb. 1957). We note, in passing, that even though the possibility of some future presentation of the representation issue to the NLRB should not forestall the courts from directing arbitration, it is not at all inconsistent for a court to defer its judgment should the Board already be seised of jurisdiction over a complaint by one of the parties to the contract. See Note, 59 Colum. L. Rev. at 170.

afoul of Article XI(3) of the collective bargaining agreement:

> "Employees who have been or may be transferred to jobs outside the bargaining unit may be returned to their former classification in the bargaining unit in accordance with total length of continuous service. Employees in any plant who have been certified in a bargaining unit not covered by this Agreement shall have no rights under this Agreement."

Judge Palmieri held this provision unlawful because designed "to preserve seniority rights of employees who leave the unit but do not join another union while denying this privilege to employees who do join another union." In deciding that this discriminatory effect gave rise to an unfair labor practice, Judge Palmieri relied upon *NLRB* v. *International Ass'n of Machinists*, 279 F. 2d 761 (9th Cir.), cert. denied, 364 U. S. 890 (1960).

We hold that the withdrawal of this grievance from arbitration was premature, and that it, along with all other grievances brought before us on this appeal, must be submitted to arbitration. As we understand the grievance, the union contends in part that Haslam was returned to the bargaining unit in a new position at a time when his former position was no longer in existence; this is said to render inoperative the seniority clause because Haslam was not "returned to * * * [his] former classification in the bargaining unit * * *." Surely this raises a question of contract interpretation meet for decision by the arbitrator. And the reasons for the inapplicability of the preemption doctrine require that arbitration be compelled here also. It will provide a ready means of healing the disruptive relationship between union and management; not only will it resolve questions going to the merits of the collective bargaining agreement, but as we have already said, it may have the "therapeutic values" of which the Supreme Court spoke in *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960). Even if we were to assume the NLRB's position to be so clear as Judge Palmieri thought, conflict with its policies is here wholly conjectural. It is by

no means clear that the union's grievance will be found warranted. Further, if the arbitrator does uphold the union's construction of the seniority provision in question, he might himself decline to fashion an award based upon it for fear that he would encourage a practice banned by the labor act. We cannot construct a framework of legal principles governing arbitration on the theory that the arbitrator is ignorant or oblivious of the pronouncements of the Board and the courts. As another alternative which would not run afoul of the act, but would indeed further its purposes, the arbitrator might decide that the second sentence, which arguably discriminates against those anxious to exercise rights protected by the act, is severable and should be discarded but that the union's claim is supportable under the first sentence.

Only if none of these approaches is adopted by the arbitrator would it become necessary to determine whether a court should enforce an award that clearly compels an unfair labor practice. To do so now would be to "raise an unfair labor practice question prematurely and gratuitously." Wollett, "The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?", 10 Lab. L. J. 477, 482 (1959) (suggesting that even the Board should stay its hand until the arbitrator has given an authoritative interpretation of the contract).

In sum, we affirm those portions of the district court's order requiring arbitration of all grievances alleged to fall without the contractual authority of the arbitrator, all grievances alleged to fall within the exclusive jurisdiction of the National Labor Relations Board, and all "procedural" issues to be determined before reaching the merits. We reverse those portions of the order withholding from arbitration certain procedural issues which the Court itself determined, as well as the grievance the arbitration of which is said to compel the commission of an unfair labor practice.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 22 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 485

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent

RESPONSE OF WESTINGHOUSE ELECTRIC CORPORATION TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN D. CALHOUN,
JOHN F. HUNT, JR.,
1 Chase Manhattan Plaza,
New York 5, N. Y.,
Counsel for Respondent.

CRAVATH, SWAINE & MOORE,
Of Counsel

March 22, 1963

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*, *v.* WESTINGHOUSE ELECTRIC CORPORATION, *Respondent*.	No. 485

RESPONSE OF WESTINGHOUSE ELECTRIC CORPORATION TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Since the completion (on November 2, 1962) of the papers in this matter provided for by Rules 21, 23 and 24, Petitioner has filed a Memorandum (February 14, 1963) and a Supplemental Memorandum (March 20, 1963) in further support of his Petition.

The Memorandum calls the attention of this Court to (i) the motion to dismiss theretofor filed in this Court in No. 419 (October Term 1962—on petition for writ of certiorari) (hereinafter *"Raytheon"*); and (ii) this Court's own decision in *Smith* v. *Evening News Ass'n* (371 U. S. 195). (The motion, which was granted on March 18, 1963, was grounded on a settlement agreement among all the parties in *Raytheon* and David Cole, impartial umpire under the AFL-CIO *Internal Disputes Plan*, pursuant to which the two rival unions and the employer in that case are to arbitrate their differences in a manner binding on

all, the criteria resulting from such arbitration to be applicable to subsequent arbitrations and proceedings instituted under the AFL-CIO *Internal Disputes Plan.)*

The Supplemental Memorandum (i) calls the attention of this Court to the opinion of the Court of Appeals for the Second Circuit in *Carey* v. *General Electric Co.*, F. 2d . , (decided March 11, 1963) and (ii) after setting forth various arguments, urges this Court to grant the petition and simultaneously "reverse the court below without further briefs or argument, and avoid further postponement[*] of the arbitration of the grievances which gave rise to this action" (p. 4).

The disagreement of the Second Circuit in *General Electric* with the opinion of the Court of Appeals for the First Circuit in *Raytheon* (See note 12, p. 24, Appendix to Supplemental Memorandum), clearly does not require summary action in the instant case. This Court does not sit to reverse lower court decisions inconsistent with decisions of the Second Circuit, but to resolve conflicts among the decisions of the various lower courts. The weight of the lower court authority on the subject of the arbitrability of certification and representational grievances being *contra* to *General Electric*, the Second Circuit's decision does not make frivolous the position of the First Circuit in *Raytheon* or the position of the court below in the instant case. Indeed, in *Raytheon* the views of the Solicitor General were invited—a posture hardly suggestive of the propriety of summary disposition.

---

*On the subject of *"postponement"*, Petitioner (i) postponed for one year and eight months the instituting of court action after Respondent had denied the arbitrability of the so-called Baltimore Grievance in the instant case (Rec., p. 71, f. 212), (ii) postponed for over one year the institution of court action after Respondent denied the arbitrability of the so-called East Pittsburgh Grievance in the instant case (Rec., p. 91, f. 273), and (iii) postponed for almost a full 90 days the filing of his Petition to this Court.

The Supplemental Memorandum seems to say that, because the Second Circuit construed Petitioner's contract with General Electric in respect of a particular grievance differently from the way in which the court below construed Petitioner's contract with Respondent in respect of the East Pittsburgh grievance (that involved in the second question posed by the Petition), summary action by this Court on that second question is appropriate. Suffice it to say that the contract and the grievance in the East Pittsburgh situation are different from those in the situation before the Second Circuit and, particularly, the exclusionary *proviso* to the arbitration clause in General Electric's contract is materially different than the exclusionary *proviso* in Respondent's contract (see first full paragraph, p. 15, Appendix to the Supplemental Memorandum) (and, of course, there are several other material differences in the respective contracts). In any event, particular judicial applications of particular arbitration clauses to particular grievances do not give rise to legal inconsistencies.

To the extent to which the Memorandum and the Supplemental Memorandum

> (a) urge that the legal issues relating to the arbitrability of a grievance involving certifications and representational matters are identical with those relating to the arbitrability of a grievance involving conduct which might also constitute an unfair labor practice,

the material differences between those two types of grievances have been thoroughly treated in the papers filed pursuant to the Rules; and

> (b) urge the relevance of *General Electric's* discussion of the arbitrability of grievances involving "work assignments."

the differences between a "work assignment" grievance (discussed in *General Electric*) and a "representation and certification" grievance (involved in the instant case) have also been set forth in the papers filed pursuant to the Rules.

Respectfully submitted,

JOHN D. CALHOUN,
JOHN F. HUNT, JR.,
1 Chase Manhattan Plaza,
New York 5, N. Y.,
Counsel for Respondent.

CRAVATH, SWAINE & MOORE,
Of Counsel

March 22, 1963

INDEX

	Page
Statute involved	1
Question presented	2
Statement	2
Summary of argument	4
Argument	8
Introductory	8
I. The jurisdiction of the NLRB in the event of a strike over disputes involving work assignments does not preclude arbitration of such a dispute under the terms of a collective bargaining agreement	14
II. The jurisdiction of the NLRB over questions of representation does not preclude arbitration over the scope of a collective bargaining agreement pursuant to its terms	24
Conclusion	36
Appendix	37

CITATIONS

CASES:

Acoustical Contractors Association of Cleveland, 119 NLRB 1345	18, 20
Adohr Milk Farms, 8 LA 459	35
Alco Products, Inc., 32 LA 873	17
Allain v. *Tummon*, 212 F. 2d 32	21
Alpha Corp., 128 NLRB 309	24
American Broadcasting Co., 112 NLRB 605	26
American International Aluminum Corp., 38 LA 1131	20
Anheuser-Busch, Inc., 116 NLRB 1988	26
Armco Drainage & Metal Products Co., 137 NLRB 1753	18
Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238	8, 15
A.W. Lee, Inc., 113 NLRB 947	18, 20
Avco Corp. v. *Preteska*, 22 Conn. Sup. 475, 174 A. 2d 684	35
Ball Brothers Co., Inc., 27 LA 353	19
Beaunit Mills, Inc., 37 LA 366	17
Bee Line, Inc., 20 LA 675	15
Bell Aircraft Corp., 2 LA 22	35
Bell Helicopter Corp., 34 LA 412	17
Black v. *Cutter Laboratories*, 43 Cal. 2d 788, 278 P. 2d 905, certiorari dismissed, 351 U.S. 292	35
Blaw-Knox Co., 135 NLRB 862	24
Briggs Indiana Corp., 63 NLRB 1270	28

Page

Brotherhood of Railroad Trainmen v. *Templeton*, 181 F. 2d 527, certiorari denied, 340 U.S. 823 21
Carey v. *General Electric Co.*, 315 F. 2d 499, petition for certiorari pending, No. 114, October Term, 1963 ..28, 30, 33, 34
Celanese Corp. of America, 3 LA 765 35
Clarostat Mfg. Co., 105 NLRB 20 24
Clarostat Mfg. Co., 107 NLRB 775 24
Cleveland Pneumatic Tool Co., 142 NLRB No. 48, 53 LRRM 1025 23
Communications Workers of America, 118 NLRB 1104 26
Consolidated Aircraft Corp., 47 NLRB 694 10
Crown Zellerbach Corp., 95 NLRB 753 11
Darrell v. *Neushaefer*, 22 LA 240 19
Doll & Toy Workers v. *Metal Polishers*, 180 F. Supp. 280 ... 33
Don Cartage Co., Inc., 121 NLRB 101 18
Drake Bakeries v. *Local 50, American Bakery & Confectionary Workers*, 370 U.S. 254 15
Dowd Box Co. v. *Courtney*, 368 U.S. 502 8
Dubo Manufacturing Corp., 142 NLRB No. 47, 53 LRRM 1070 11
Dumas v. *Upland Bros., Inc.*, 16 LA 588 19
Eastern Stainless Steel Corp., 7 LA 267 35
Ed Friedrich, Inc., 39 LA 399 17
E.I. DuPont De Nemours, 99 NLRB 390 24
Employing Plasterers Association of the District of Columbia, 118 NLRB 17 26
Essex County News Co., 76 NLRB 1340 28
Essex Wire Corp., 130 NLRB 450 ..... 13, 24
Estes v. *Union Terminal Co.*, 89 F. 2d 768 21
Garner v. *Teamsters Union*, 346 U.S. 485 8
Gas Service Co., 140 NLRB No. 45, 52 LRRM 1037 ..... 23, 26
General Aniline & Film Corp., 89 NLRB 467 26
General Motors Corp., 37 LA 192 17
Goodyear Tire & Rubber Co., 6 LA 924 35
Goodyear Tire & Rubber Co., 35 LA 917 17
Hamilton-Scheu & Walsh Shoe Co., 80 NLRB 1496 34
Hercules Motor Corp., 136 NLRB 1648 11
Hershey Chocolate Corp., 129 NLRB 1052 34
Higgins, Inc., 37 LA 297 17
Hughes Tool Co., 85 NLRB 663 ..... 24, 31
Hunter v. *Atchison, Topeka & S.F. Ry. Co.*, 171 F. 2d 594, certiorari denied, 337 U.S. 916 21
Huron Portland Cement Co., 115 NLRB 879 28
Illinois Bell Telephone Co., 39 LA 467 17
Illinois Malleable Iron Co., 120 NLRB 451 24

Page

In Re Advance Trucking Corp., 52 LRRM 2365 15
In Re Regent Quality Furniture, Inc., 20 LA 609 15
In Re Ruppert, 29 LA 775 15
International Association of Machinists v. *Raytheon Mfg. Co.*, 304 F. 2d 365, certiorari granted, 371 U.S. 908, judgment vacated as moot, 372 U.S. 523 27
International Brotherhood of Teamsters v. *W.L. Mead, Inc.*, 230 F. 2d 576 15
International Harvester Co., 138 NLRB No. 88, 51 LRRM 1155 ..... 33, 34
International Minerals & Chemical Corp., 37 LA 528 12
International Union of Operating Engineers v. *Bay City Erection Co.*, 300 F. 2d 270 15
International Union of Operating Engineers v. *Dahlem Construction Co.*, 193 F. 2d 470 15
Juneau Spruce Corp., 82 NLRB 650 23
Kaiser Aluminum & Chemical Corp., 38 LA 538 16
Kelsey-Hayes Co., 32 LA 235 17
Kennecott Copper Corp., 122 NLRB 198 ..... 24, 31
Kennametal, Inc., 132 NLRB 194 ..... 24, 31
Levingston Shipbuilding Corp., 120 NLRB 205 ..... 24, 31
Lodge 12, IAM v. *Cameron Iron Works*, 257 F. 2d 467, certiorari denied, 358 U.S. 880 33
Local Lodge 1836, IAM v. *Local No. 1505; IBEW and Raytheon Co.*, 201 F. Supp. 334 (D. Mass.), reversed on other grounds, 304 F. 2d 365, vacated as moot, 372 U.S. 523 19
Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 .... 8, 15, 33
Local 453, IUE v. *Otis Elevator Co.*, 314 F. 2d 25 35
Local Union No. 68, Wood, Wire and Metal Lathers Union (Acoustics & Specialties, Inc.), 142 NLRB No. 101, 53 LRRM 1181 18
Local Union 825, Operating Engineers (Nichols Electric Co.), 137 NLRB 1425 18
Lumber and Millwork Industry Labor Committee, The, 136 NLRB 1083 24
Manhattan Construction Co., 96 NLRB 1045 18
Marietta Paint and Color Co., 136 NLRB 1530 24
Marlin Rockwell Corp., 27 LA 651 34
Marine Engineers Beneficial Association v. *Interlake Steamship Co.*, 370 U.S. 173 8
Matter of Western Union Tel. Co., 299 NY 177, 86 N.E. 2d 162 35
McDonnell Aircraft Corp., 109 NLRB 930 11
Missouri-Kansas-Texas Ry. Co. v. *Brotherhood of Railway & S.S. Clerks*, 188 F. 2d 302 21

Page

Monsanto Chemical Corp., 97 NLRB 517 ..... 11, 34
National Labor Relations Board v. *International Association of Machinists*, 279 F. 2d 761, certiorari denied, 364 U.S. 890 34
National Labor Relations Board v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573 18
National Steel & Shipbuilding Co., 40 LA 625 19
New Britain Machine Co., 116 NLRB 645 34
New London Mills, Inc., 91 NLRB 1003 23
Newark & Essex Plastering Co., 121 NLRB 1094 23
New York Mailers' Union No. 6 (The New York Times Co.), 137 NLRB 665 18
Nord v. *Griffin*, 86 F. 2d 481, certiorari denied, 300 U.S. 673 21
Order of Railroad Telegraphers v. *New Orleans, Texas & Mexico Ry. Co.*, 229 F. 2d 59, certiorari denied, 350 U.S. 997 21
Paramount Pictures, Inc., 79 NLRB 557 34
Perry Coal Co., 125 NLRB 1256 24
Philip Morris & Co., Ltd., 70 NLRB 274 13
Plumbing Contractors Ass'n of Baltimore, Md., 93 NLRB 1081 26
Radio Station KHQ, 111 NLRB 874 ..... 24, 26, 31
Raley's Inc., 143 NLRB No. 40, 53 LRRM 1347 ..... 11, 33
Raytheon Co., 140 NLRB No. 84, 52 LRRM 1129 11
Retail Clerks v. *Montgomery Ward & Co.*, 50 LRRM 2702 affirmed, 53 LRRM 2069 33
Retail Clerks Union, Local 770 v. *Thriftimart, Inc.*, 30 Cal. Rptr. 12, 380 P. 2d 652 ..... 13, 21
Reynolds Metals Co., 39 LA 730 ..... 16, 20
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 ..... 8, 9
Smith v. *Evening News Association*, 371 U.S. 195 ..... 4, 8, 9, 16, 24, 25, 29, 30
Smith v. *Gladney*, 128 Tex. 354, 98 S.W. 2d 351 35
Soto v. *Goldman*, 34 LA 173 19
Spielberg Mfg. Co., 112 NLRB 1080 11
S.S. White Dental Mfg. Co., 26 LA 428 34
St. Regis Paper Co., 130 NLRB 1235 ..... 13, 24, 31
Sullivan Dry Dock & Repair Corp., 1 LA 9 35
Textile Workers Union of America v. *Lincoln Mills*, 353 U.S. 448 32
Theo. Hamm Brewing Co., 34 LA 698 20
Traylor, Wm. F., 97 NLRB 1003 18

Page

United Electrical, Radio & Machine Workers v. *Oliver Corp.*, 205 F. 2d 376 15
United Telephone Company of the West, 112 NLRB 779 11
Weber v. *Anheuser-Busch Inc.*, 348 U.S. 468 8
Western Cartridge Co., 134 NLRB 67 24
Wertheimer Stores Corp., 107 NLRB 1434 11
Whitehouse v. *Illinois Central Ry. Co.*, 349 U.S. 366 21
Woodward Iron Co., 116 NLRB 1639 24
Wyandotte Chemicals Corp., 38 LA 808 20
Yutana Barge Lines, 123 NLRB 1073 24

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Section 8(a) 6, 7, 22, 24, 25, 32, 34, 37
Section 8(b) 5, 6, 14, 15, 17, 18, 22, 23, 37
Section 9 ..... 7, 22, 23, 38
Section 10 ..... 5, 10, 14, 15, 17, 18, 22, 23, 32, 33, 39

Section 301 of the Labor-Management Relations Act 9, 39

MISCELLANEOUS:

93 Cong. Rec. 4035, 2 Leg. Hist. LMRA 1046 (G.P.O. 1948) .. 18
Cox, *Place of Law in Labor Arbitration*, 34 Chicago Bar Record 205 (1953) 33
Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956) 20
Decision of the National Board for Jurisdictional Awards in the Building Industry, *Plan for Settling Jurisdictional Disputes Nationally and Locally, Agreements and Decisions Rendered Affecting the Building Industry, Building and Construction Trades Department, A.F. of L.*, 73-74 (1950) 12
Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations: II*, 59 Col. L. Rev. 269 (1959) ... 33
Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529 (1963) 19, 29, 33
Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362 (1962) 20
Twenty-Seventh Annual Report of the National Labor Relations Board, 1, 3 (G.P.O., 1963) 31

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 21

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

WESTINGHOUSE ELECTRIC CORPORATION

On Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of April 1, 1963 (R. 78), inviting the Solicitor General to file a brief expressing the views of the United States.

STATUTE INVOLVED

The pertinent sections of the Labor Management Relations Act, 1947, Act of June 23, 1947, 61 Stat. 136-162, 29 U.S.C. 151 *et seq.*, are set forth in the Appendix, *infra*, pp. 37-40.

QUESTION PRESENTED

Whether the jurisdiction of a State court under Section 301 of the Labor Management Relations Act to enforce the arbitration provisions of a collective bargaining agreement includes power to compel arbitration of a grievance alleging that the employer has violated the agreement by assigning certain employees and work within the bargaining unit covered by the agreement to another bargaining unit, and by refusing to apply the terms and provisions of the agreement to those employees and that work.

STATEMENT

This is a suit to compel arbitration pursuant to the terms of a collective bargaining agreement between the petitioner union (IUE) and the respondent Company, Westinghouse. The agreement, a so-called "National Agreement," covered employees at various plants of the Company, including one in Baltimore, Md., where this dispute arose. (R. 7-8, 77.) The agreement contains a provision whereby the Company agrees to recognize IUE, in conjunction with its Locals, for those units for which IUE or its Locals were certified by the National Labor Relations Board as exclusive bargaining representative. An appendix to the agreement, listing the units for which IUE had been certified as of the date of the agreement, includes a unit defined as "All production and maintenance employees of the Employer at its Baltimore works . . . but excluding all salaried technical . . . employees." (R. 13.)[1] The agreement also contains a grievance procedure and pro-

[1] This unit definition was taken, *in haec verba*, from the Board's 1955 certification of IUE for a production and maintenance unit at the Company's Baltimore plant (R. 28).

vides for arbitration of unresolved grievances, including those involving "interpretation, application or claimed violation of a provision of this Agreement" (R. 8-12).

In March 1958, the IUE filed a grievance, in accordance with the contract procedure, asserting that employees doing certain work in the engineering laboratory at the Baltimore plant "should be in the IUE, Local 130 bargaining unit" (R. 41).[2] The employees in the engineering laboratory were represented by another union, "Federation,"[3] which had been certified by the Board for a unit of "All salaried, technical . . . employees . . . but excluding . . . all production and maintenance . . . employees" (R. 30). The IUE's position, as more fully developed subsequent to the filing of the grievance, was that the employees in question were performing production and maintenance work which fell within its unit; that indeed some of the work had been transferred out of that unit; and accordingly, that respondent's refusal to apply the terms of its contract with IUE to the employees and the work constituted a violation, *inter alia,* of the recognition clause of the contract and of the unit description in the appendix thereto. (R. 12-14, 35-36.) The parties could not resolve the grievance, and the

---

[2] The grievance, *in toto*, read as follows (R. 41):

> The Union contends that the employees working on induction heating and are performing assembly and wiring; power brake operations; machining operations; and attending to the tool crib and storeroom operations should be in the IUE, Local 130 bargaining unit.

[3] Association of Westinghouse Salaried Employees, X-ray and Industrial Electronics Division, an affiliate of the Federation of Westinghouse Industrial Salaried Unions.

Company refused to arbitrate it on the ground that it presented a representation matter for the National Labor Relations Board (R. 14, 16, 30).

On June 8, 1960, IUE petitioned the New York Supreme Court, in and for the County of New York, for an order compelling arbitration of this and other grievances, not here relevant (R. 7-16). The New York Supreme Court, though it granted the IUE petition with respect to other grievances, declined to order arbitration as to the instant grievance (R. 42-50). The Appellate Division, with one Justice dissenting, affirmed the lower court (R. 54-62). The Court of Appeals of the State of New York, in a *per curiam* opinion (R. 65-67), affirmed the Appellate Division, holding that the grievance involved the definition of bargaining units and that it was "within the exclusive jurisdiction of NLRB, which has the expertise to make clear the precise nature of the bargaining units certified by it." Judge Fuld dissented, holding that the preemption doctrine (see n. 4, *infra*) was inapplicable to suits, such as the instant one, for breach of a collective bargaining agreement. He added that: "The circumstance that there might be a claim before the National Board *at some date in the future* should not operate to deprive the parties of contract rights at the present time." (R. 68-69, emphasis in original.)

SUMMARY OF ARGUMENT

In *Smith* v. *Evening News Association*, 371 U.S. 195, this Court held that the courts have jurisdiction under Section 301 of the Labor Management Relations Act to entertain suits for breach of a collective bargaining agreement even when the conduct alleged to constitute the breach might also constitute an unfair labor prac-

tice cognizable by the NLRB under Sections 8 and 10 of the NLRA.

The basic question presented here is whether inter-union jurisdictional disputes form an exception to the general rule either because special provisions of the NLRA may be implicated or because one of the unions is not a party to the collective bargaining agreement. Two basic types of inter-union "jurisdictional disputes" should be distinguished: (i) a "work assignment dispute" involving a controversy as to whether certain work should be performed by workers in one or another of two bargaining units; and (ii) a "representational dispute," in which the issue is not where the work should go, but rather which union should represent the employees doing that work. We believe the present case grows out of a representation, rather than a work assignment dispute, but since this is not at all certain we consider the jurisdictional issue on each assumption.

A. Under Section 8(b)(4)(D) it is an unfair labor practice for a labor organization to strike or threaten to strike for the purpose of forcing an employer to assign particular work to its members rather than to the members of another union. And when a violation of that section is charged, the Board is then empowered by Section 10(k) to hear and determine the jurisdictional dispute out of which the strike arose. Where the union has actually gone on strike in support of its work assignment demands, there is no greater reason to hold that the NLRB remedy is exclusive than there is where the union is seeking arbitration or an adjudication of a breach of contract involving a discriminatory discharge or other employer unfair labor practice. All of the reasons which underlie the *Smith* decision

are applicable here. And in a case where the work assignment dispute has not yet erupted into a strike, there are additional reasons for allowing judicial enforcement of any contract rights. Section 8(b)(4)(D) gives no remedy whatever to the aggrieved union, and neither it nor Section 10(k) even comes into play unless there is a strike. To foreclose the use of the courts or the arbitral forum would run counter to NLRA policies by forcing the union to resort to an unfair labor practice in order to redress what it believed to be an employer's breach of contract. Moreover, Section 10(k) reveals on its face a strong policy of encouraging the use of private arbitration to settle jurisdictional disputes.

Although the inability to bind both unions lessens, it by no means destroys, the value of grievance arbitration as a remedy for work assignment disputes. Either the State court or the arbitrator, once its jurisdiction is established, might allow the Federation to intervene. But even if not, the proceeding would not be fruitless. If the IUE loses, that will probably be the end of the matter; if it prevails, the arbitrator's opinion may persuade the Federation that its claim lacks merit or may persuade another arbitrator not to award the same work to the Federation. Arbitration of work assignments is common practice, and while the awards do not always terminate the controversy, on the whole they have been conducive to final settlements.

B. In our view, however, the grievance here involves a question of representation, rather than work assignment. Such controversies may come before the Board either on a refusal-to-bargain charge brought by the aggrieved union against the employer under Section 8(a)(5), or on a motion to clarify the certification filed

by either of the rival unions or by the employer under Section 9. The availability of a Section 8(a)(5) remedy, as *Smith* squarely decided, would not oust a court of jurisdiction, and there is no reason to give greater significance to the availability of a motion to clarify, since the policies underlying *Smith* are equally applicable there. While there are several practical and legal differences between a three-sided dispute over the scope of a bargaining unit and the ordinary unfair labor practice dispute, these differences are insufficient to require a difference in jurisdiction. In the first place, the introduction of exceptions based upon the particular clause of the contract said to be violated or the precise provisions of the NLRA that might be invoked would introduce technical niceties productive of delay and confusion. It would be particularly impracticable to make the jurisdictional issue turn upon the often formal and narrow distinctions between a work assignment and a representation dispute. Second, many claims under collective bargaining agreements relating to the scope of the unit covered will depend upon the language of the contract rather than any NLRB ruling, and any contractual departures from the NLRB units will result from the type of voluntary arrangements with which the preemption doctrine is not concerned. Third, ousting arbitrators of jurisdiction in any case involving a representation question would frequently fragment questions that ought to be considered whole, *e.g.*, the seniority status under the collective bargaining agreement of the current holders of the disputed jobs. Fourth, the danger of hampering the growth of umpireships and voluntary arbitration is not substantially less than in the situations envisaged in *Smith*.

ARGUMENT

INTRODUCTORY

The national labor policy is to encourage and support the private arbitration of disputes arising under collective bargaining agreements. An arbitration clause will generally be enforced even though the dispute, or some part of it, might arise out of an unfair labor practice within NLRB jurisdiction. In *Smith* v. *Evening News Association*, 371 U.S. 195, this Court held that the courts have jurisdiction under Section 301 of the Labor Management Relations Act to entertain suits for breach of a collective bargaining agreement even when the conduct alleged to constitute the breach might constitute an unfair labor practice cognizable by the NLRB under Sections 8 and 10 of the NLRA. Although the Act precludes the application of State statutes and common law doctrines regulating the conduct of employers, employees, and their representatives apart from a collective agreement,[4] that principle does not apply to the enforcement of obligations voluntarily incurred in the bargaining that the Act is intended to promote. See also *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101, n. 9; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245, n. 5; *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 513. The *Smith* decision obviously applies to actions to enforce agreements to arbitrate, and also, *a fortiori*, to proceedings before an arbitrator.

---

[4] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch Inc.*, 348 U.S. 468; *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

At bottom, the *Smith* ruling rests upon four grounds:

(1) Congress, in enacting Section 301 of the LMRA and in declining to make breach of a collective bargaining agreement an unfair labor practice manifested an intent to permit judicial remedies for violation of a collective bargaining agreement to operate concurrently with, and in addition to, any remedies which might exist under the NLRA for the same conduct.

(2) State statutory and tort law (as to which the *Garmon* preemption doctrine is applicable) are rules devised by government and imposed coercively upon the parties from without, whereas the standards of conduct prescribed by a collective bargaining agreement are self-imposed and shaped to the particular circumstances of the enterprise whose industrial life they govern. Accordingly, the enforcement of contract provisions by tribunals other than the Board does not entail the same danger of upsetting the federal statutory balance between the interests of labor and management that is present when another governmental body attempts to impose restraints not based upon mutual consent. Indeed, where the parties have bargained for lawful contractual provisions and agreed upon a procedure for enforcing them, it promotes industrial peace and the private resolution of disputes to give effect to their arrangements. Requiring the parties to utilize only an NLRB remedy would, on the other hand, defeat their contractual expectations, deprive them of whatever bargained-for benefits the particular contract clause was intended to confer, and thus impair the flexibility and autonomy of the institution of collective bargaining.

(3) The unfair labor practice element of many contract questions is often only a small aspect of the total problem, and it is impractical to segment the problem and have part of it adjudicated by the Board and the remainder by the court or arbitrator. Frequently, moreover, the unfair labor practice question may turn upon difficult subsidiary questions of contract construction, which an arbitrator or a court could decide as well as, if not better than, the Board.

(4) To deny the court power to enforce contract provisions which could also give rise to unfair labor practice questions would tend to cripple the operation of private grievance procedures. If the courts were unable to compel recalcitrant parties to submit to arbitration and to abide by the arbitrator's decision, compliance with arbitration agreements would become merely optional. Furthermore, to hold that the preemption doctrine governs all contract provisions that deal with a dispute touched by the NLRA would require arbitrators to defer to the Board, a result which would undermine the congressional policy of giving full play to the methods of grievance settlement that the parties themselves have chosen—a policy which the Board itself has recognized in its administration of the NLRA.[5]

---

[5] Although Section 10(a) of the Act provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," the Board, from its earliest days, has generally declined to exercise jurisdiction with respect to unfair labor practice questions which had been, or could have been, submitted to arbitration under the collective bargaining contract. In *Consolidated Aircraft Corp.*, 47 NLRB 694, it was alleged that the employer had made unilateral changes in wages in violation of Section 8(a)(5) and had discharged two employees

The basic question presented in the instant case is whether interunion jurisdictional disputes form an exception to the general rule either because special provisions of the NLRA may be implicated or because one of the unions is not a party to the collective bargaining agreement and arbitration clause that the other union is seeking to enforce. We believe, as we show below (pp. 16-17 and 25-31), that each of the foregoing reasons for the *Smith* decision is equally applicable even when the proceeding involves an interunion dispute. However, the issue is more complex because the underlying controversy involves not simply the employer and a single collective bargaining agreement but two contracts and two rival labor organizations each representing a different group of employees. Furthermore, the parties might invoke not one but several potential heads of NLRB jurisdiction.

---

in violation of Section 8(a)(3). Finding that the propriety of the wage changes turned on an interpretation of the collective agreement, which could have been, but was not, submitted to arbitration under the contract, and that the question of the discharges could likewise have been processed under that procedure, the Board dismissed the unfair labor practice charges. See also *Spielberg Mfg. Co.*, 112 NLRB 1080; *Crown Zellerbach Corp.*, 95 NLRB 753; *McDonnell Aircraft Corp.*, 109 NLRB 930; *United Telephone Company of the West*, 112 NLRB 779; *Hercules Motor Corp.*, 136 NLRB 1648; *Dubo Manufacturing Corp.*, 142 NLRB No. 47, 53 LRRM 1070. Furthermore, the Board has recently held that the same considerations which moved it to honor arbitration awards in unfair labor practice cases warrant a similar acceptance of the arbitral process in representation proceedings. *Raley's, Inc.*, 143 NLRB No. 40, 53 LRRM 1347.

An exception is usually made only where the arbitration proceedings were not fair, the arbitrator did not consider the issue before the Board, or the result reached was repugnant to the purposes and policies of the Act. See *Raytheon Co.*, 140 NLRB No. 84, 52 LRRM 1129; *Wertheimer Stores Corp.*, 107 NLRB 1434; *Monsanto Chemical Corp.*, 97 NLRB 517.

In discussing this issue, it will be helpful first to describe the interunion "jurisdictional disputes" which may arise during the term of a collective bargaining agreement and for the prosecution of which either union may find the terms of the agreement a potential weapon. Such controversies take various forms, but two have the greatest qualitative and quantitative importance. One is called the "work assignment dispute" because the conflict is between two groups of workers each represented by a different union and each claiming the exclusive right to perform certain tasks. The clearest examples arise in the construction industry where carpenters and laborers, for example, long disputed the right to do the work of erecting scaffolding for a building.[6] Whoever won, each group of men would continue to have the same union as its representative. No one would change his union affiliation. There would be an increase in the total amount of work available to be done by one group and a decrease for the other. Similar controversies arise in industrial plants; for example, the production workers and maintenance mechanics might both claim the right to make routine repairs to production machinery.[7]

At the other pole lies the "representational dispute." Its simplest form is rivalry between two unions such as the United Automobile Workers and the International Association of Machinists to become the desig-

---

[6] See Decision of the National Board for Jurisdictional Awards in the Building Industry, reported in *Plan for Settling Jurisdictional Disputes Nationally and Locally, Agreements and Decisions Rendered Affecting the Building Industry, Building and Construction Trades Department, A.F. of L.*, 73-74 (1950).

[7] See *International Minerals & Chemical Corp.*, 37 LA 528.

nated representative of a given group of employees. Under the National Labor Relations Act such disputes are resolved by an election. More important for present purposes are the controversies over fringe groups which might be included in either of two bargaining units represented by two different unions. One example is a dispute over whether machine fixers in a cigarette factory who make regular and routine adjustments on production machines are to be included in the production unit and represented by the Tobacco Workers or in a craft unit of skilled maintenance machinists represented by the International Association of Machinists.[8] Another example is a controversy over whether employees engaged in maintenance of powerhouse equipment outside a powerhouse are to be included in a unit of powerhouse employees or in the plant maintenance unit.[9] Under the National Labor Relations Act such disputes may be resolved by the Board's definition of the appropriate bargaining unit.[10]

The distinction which is so clear at the poles is often blurred in the middle. It may depend, as we show in the Argument (pp. 26-28), wholly upon the way in which the issue is formulated by the moving party for its own tactical advantage; thus, in the first example above the IAM might, under some circumstances, contend that the task of fixing machines must be assigned to skilled machinists rather than to the men currently performing the work. The very fact that the line is

---

[8] See *Philip Morris & Co., Ltd.*, 70 NLRB 274.

[9] See *St. Regis Paper Co.*, 130 NLRB 1235.

[10] The problem of defining the scope of the bargaining unit may also arise when it is contended that a new store or facility is an "accretion" to an existing unit. See *Essex Wire Corp.*, 130 NLRB 450; *Retail Clerks Union, Local 770* v. *Thriftimart, Inc.*, 30 Cal. Rptr. 12, 380 P. 2d 652.

blurred and the issue can often be framed either way has important consequences in determining whether the NLRB's jurisdiction is exclusive. See pp. 25-28 below.

It is far from clear whether the present case grows out of a controversy over work assignments or a dispute over questions of representation requiring more precise definition of the bargaining unit. We believe the latter classification to be correct, but in view of the uncertainty and because of the need for treating both types of controversy in the same fashion in determining whether courts and arbitrators have jurisdiction, we shall consider first the status of work assignment controversies and then turn to questions of representation. In each instance, of course, we speak only of cases involving the interpretation and enforcement of a collective bargaining agreement.

I

The Jurisdiction of the NLRB in the Event of a Strike Over Disputes Involving Work Assignments Does Not Preclude Arbitration of Such a Dispute Under the Terms of a Collective Bargaining Agreement

Work assignment disputes may come before the NLRB under Sections 8(b)(4) and 10(k). Under Section 8(b)(4)(D) it is an unfair labor practice for a labor organization to strike or otherwise induce a cessation of work, or to threaten such action, where an object thereof is—

> forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class
> * * *

That Section, in turn, triggers Section 10(k), which provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. * * *

In rare cases employers have taken to arbitration,[11] and more often to court,[12] claims that a union's resort to a strike violates a collective bargaining agreement; and such a case may potentially involve conduct that violates Section 8(b)(4)(D). There is no greater reason to hold that the NLRB remedy is exclusive in such situations than there is where the union is seeking arbitration or adjudication of an alleged breach of contract that may also have involved a discriminatory discharge or other employer unfair labor practice.

---

[11] *Bee Line, Inc.*, 20 LA 675; *In Re Regent Quality Furniture, Inc.*, 20 LA 609; *In re Ruppert*, 29 LA 775; *In Re Advance Trucking Corp.*, 52 LRRM 2365.

[12] *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238; *Drake Bakeries* v. *Local 50, American Bakery & Confectionary Workers*, 370 U.S. 254; *International Union of Operating Engineers* v. *Bay City Erection Co.*, 300 F. 2d 270 (C.A. 5); *International Brotherhood of Teamsters* v. *W.L. Mead, Inc.*, 230 F. 2d 576 (C.A. 1); *United Electrical, Radio & Machine Workers* v. *Oliver Corp.*, 205 F. 2d 376 (C.A. 8); *International Union of Operating Engineers* v. *Dahlem Construction Co.*, 193 F. 2d 470 (C.A. 6).

Each of the four reasons for the *Smith* decision is applicable here.

(1) The legislative history shows a general intent to make judicial remedies available for breach of contract and the emphasis was on suits against unions.

(2) There is no danger that the balance of legal rights and duties struck by Congress will be upset by statutory or judge-made law imposed upon the parties. Any additional obligations will be imposed by contract, and the policy of the NLRA is to encourage the mutual assumption of such obligations.

(3) Again, as in the case of discharges, the claim to be arbitrated or litigated may be broader than any possible charge of unfair labor practices, so that giving the Board exclusive jurisdiction of the latter aspect would require fragmenting a single case.

(4) Finally, controversies over work assignments, like disputes over alleged improper discharges, are part of the familiar grist of grievance arbitration. For example, in *Reynolds Metals Co.*, 39 LA 730, the arbitrator was called upon to decide whether the employer had violated a contract covering a unit of truck drivers by assigning the work of driving "fork lifts" in plant maintenance work to members of the production and maintenance unit. In *Kaiser Aluminum & Chemical Corp.*, 38 LA 538, the question was whether the employer had violated the job classification provisions of the contract by assigning the work of removing, cleaning, reinstalling, and aligning bearings on a turbo-generator to employees classified as General Repair-

men, rather than to Electricians. Other examples are collected in the footnote.[13]

In the case of disputes over work assignments prior to a strike, there are additional reasons for allowing judicial enforcement of any contract rights. Section 8(b)(4)(D) is only potentially involved, depending upon future events. It gives no remedy to the union which believes that its contract has been violated. Jurisdiction under Section 10(k) is triggered only by a strike, or a threat thereof, for it provides that the Board shall have power to determine the dispute—

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), * * *.

Thus, to foreclose the use of the courts or the arbitral forum in every work assignment dispute would run

---

[13] *E.g.*, *Goodyear Tire & Rubber Co.*, 35 LA 917 (did employer violate contract provision banning performance by supervisors of "work normally performed by employees in the bargaining unit" when, after installing automatic equipment to operate a certain machine, it assigned to supervisor rather than machine operator the job of pushing buttons and monitoring machine's performance?); *Bell Helicopter Corp.*, 34 LA 412 (did employer violate contract clause recognizing union as representative of all production and maintenance employees when it allowed laboratory employees, who were excluded from unit, to build wooden form for new part, rather than assigning job to bargaining-unit patternmaker?); *Kelsey-Hayes Co.*, 32 LA 235 (did employer violate job classification provisions of contract when it assigned machinists rather than millwrights to repair certain machinery?); *Alco Products, Inc.*, 32 LA 873 (did employer violate contract's seniority provisions by assigning to mechanic work of operating machine tool when machinist was in layoff status?). See also, *Illinois Bell Telephone Co.*, 39 LA 467; *Ed Friedrich, Inc.*, 39 LA 399; *Higgins, Inc.*, 37 LA 297; *General Motors Corp.*, 37 LA 192; *Beaunit Mills, Inc.*, 37 LA 366.

counter to NLRA policies by forcing the aggrieved union to resort to an unfair labor practice in order to redress what it believed to be the employer's breach of contract. Moreover, Section 10(k) reveals upon its face a strong policy of encouraging the use of private arbitration instead of drawing all such controversies into the Board. The legislative history also indicates that one purpose of Section 10(k) was to encourage the creation and utilization of private methods of dispute settlement.[14] Accordingly, the Board has repeatedly given effect to private agreements for the settlement of jurisdictional disputes.[15]

We concede that the arbitration machinery invoked by the IUE in the present case is not an agreed upon method of settling the interunion dispute, within the meaning of Section 10(k), because the contract does not bind the Federation of Westinghouse Salaried Employees. If either union went on strike and the employer charged a violation of Section 8(b)(4)(D), the Board would have a duty to determine the dispute.[16]

---

[14] See 93 Cong. Rec. 4035, 2 Leg. Hist. LMRA 1046 (CPP.O. 1948); *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 577; *Acoustical Contractors Association of Cleveland*, 119 NLRB 1345, 1352; *A.W. Lee, Inc.*, 113 NLRB 947, 951.

[15] *Manhattan Construction Co.*, 96 NLRB 1045; *Wm. F. Traylor*, 97 NLRB 1003; *A.W. Lee, Inc.*, 113 NLRB 947; *Acoustical Contractors Association of Cleveland*, 119 NLRB 1345; *Don Cartage Co., Inc.*, 121 NLRB 101; *Armco Drainage & Metal Products Co.*, 137 NLRB 1753.

[16] See *New York Mailers' Union No. 6 (The New York Times Co.)*, 137 NLRB 665, 668-669; *Local Union 825, Operating Engineers (Nichols Electric Co.)*, 137 NLRB 1425, 1429. Cf. *Local Union No. 68, Wood, Wire and Metal Lathers Union (Acoustics & Specialties, Inc.)*, 142 NLRB No. 101, 53 LRRM 1181.

But it would charge Congress with an extraordinary incongruity to suppose that, although it desired to promote both arbitration under collective agreements and the voluntary settlement of jurisdictional disputes, it nevertheless desired to exclude the arbitration of work assignments between the two parties to a collective bargaining agreement in favor of the jurisdiction that the Board would have if, and only if, a strike should result.

Although the inability to bind both unions lessens the value of grievance arbitration as a remedy for disputes over work assignments, it would be a serious mistake to brush the procedure aside as unimportant. We deal here only with the question of jurisdiction to order arbitration. The State court, once its jurisdiction is established, may allow the Federation to intervene.[17] The court might require the arbitrator to allow intervention or the arbitrator might take that step upon his own motion.[18] Even if none of these measures were adopted—and perhaps the law of arbitration provides for none[19]—the proceeding would not be fruitless. If

---

[17] See Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 576 (1963); but compare *Local Lodge 1836, IAM* v. *Local No. 1505, IBEW and Raytheon Co.*, 201 F. Supp. 334, 337 (D. Mass.), reversed on other grounds, 304 F. 2d 365, 367 (C.A. 1), vacated as moot, 372 U.S. 523.

[18] Indeed, one arbitrator, called upon to resolve a dispute between the Machinists and the employer over an allegedly improper assignment of work to employees represented by the Ironworkers, issued an "arbitral interpleader," joining Ironworkers as a party to the arbitration proceeding. *National Steel & Shipbuilding Co.*, 40 LA 625, 630-636.

[19] See *Ball Brothers Co., Inc.*, 27 LA 353; *Dumas* v. *Upland Bros., Inc.*, 16 LA 588 (N.Y. Sup. Ct., N.Y. County); cf. *Soto* v. *Goldman*, 34 LA 173 (N.Y. Ct. Appls); *Darrell* v. *Neushaefer*, 22 LA 240 (N.Y. Sup. Ct., N.Y. County).

For a general discussion of the analogous problem of the right of

the IUE loses, that will probably be the end of the matter.[20] If IUE prevails, the employer may be able to use the arbitrator's opinion to persuade the Federation that its claim lacks merit, or another arbitrator hearing the ensuing dispute between the employer and the Federation may decide that the two collective bargaining agreements are consistent and render an award compatible with the first decision.

Our conviction that the arbitration of work assignments under collective agreements will aid in resolving inter-union jurisdictional disputes without either side resorting to the unfair labor practice that alone would give the Board jurisdiction is based upon experience as well as logical analysis. Arbitration of work assignments is common practice; and while the reports do not show how often there was a rival union in the background, more often than not the cases involve decisions concerning the scope of a collective agreement. See, *e.g., Reynolds Metals Co.*, 39 LA 730; *American-International Aluminum Corp.*, 38 LA 1131; *Theo. Hamm Brewing Co.*, 34 LA 698; *Wyandotte Chemicals Corp.*, 38 LA 808. In the railroad industry two unions are always involved, but the practice is nonetheless for the Adjustment Boards to render decisions under each

---

the individual employee to intervene in arbitration proceedings instituted by the union or the employer, and affecting his interests, see Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362, 405-410 (1962). See also Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 616-619, 645-652 (1956).

[20] Since the IUE had a contract procedure available and had utilized it, it would appear that it could not use the Board as a forum to relitigate its claim to the work in question. See *Acoustical Contractors Association of Cleveland*, 119 NLRB 1345, 1353; *A.W. Lee, Inc.*, 113 NLRB 947, 953-954, n. 14, p. 18, *supra*.

separate union agreement. See *Missouri-Kansas-Texas Ry. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 188 F. 2d 302, 305 (C.A. 7); *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 229 F. 2d 59, 62-64 (C.A. 8), certiorari denied, 350 U.S. 997. The awards do not always terminate the controversy, but on the whole they have been conducive to final settlements.[21]

For the foregoing reasons we think it plain that the

---

[21] In *Whitehouse* v. *Illinois Central Ry. Co.*, 349 U.S. 366, the clear possibility that arbitration between one union and the employer could result in final settlement of an inter-union work assignment dispute led this Court to reverse an injunction which had issued enjoining the National Railroad Adjustment Board from deciding the dispute. The plaintiff employer had urged, just as respondent does here, that an award rendered in a proceeding with only one union participating would not prevent the other union from successfully prosecuting a similar claim under its contract, and that if the arbitration proceedings were not enjoined the employer might be confronted with conflicting claims and suffer irreparable injury. The Court held, however, that the injuries feared by the employer were too speculative to warrant judicial relief, stating that, "Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it" (*Id.*, at 373). So here, an arbitration award may be rendered "which could occasion no possible injury" to respondent. It might obtain an award in its favor in the arbitration with IUE, or, should that award be in favor of IUE, the same result might be reached in any arbitration, if there be such, with Federation.

See, however, *Order of Railway Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 229 F. 2d 59 (C.A. 8), certiorari denied, 350 U.S. 997; *Allain* v. *Tummon*, 212 F. 2d 32 (C.A. 7); *Missouri-Kansas-Texas Ry. Co.* v. *Brotherhood of Railway & S.S. Clerks*, 188 F. 2d 302 (C.A. 7); *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8), certiorari denied, 340 U.S. 823; *Hunter* v. *Atchison, Topeka & S.F. Ry. Co.*, 171 F. 2d 594 (C.A. 7), certiorari denied, 337 U.S. 916; cf. *Estes* v. *Union Terminal Co.*, 89 F. 2d 768 (C.A. 5); *Nord* v. *Griffin*, 86 F. 2d 481 (C.A. 7), certiorari denied, 300 U.S. 673. See also *Retail Clerks Union, Local 770* v. *Thriftimart, Inc.*, 30 Cal. Rptr. 12, 380 P. 2d 652, 655-656.

conditional and limited jurisdiction of the Board over work assignment disputes does not preclude their arbitration under collective bargaining agreements. This proposition would dispose of the present case if the present controversy were to be classified as a work assignment dispute that might give rise to a controversy potentially cognizable under Sections 8(b)(4)(D) and 10(k) but not under any other section of the Act.

In our view, however, the grievance involves questions of representation cognizable, as we shall show (p. 24 below), under Sections 8(a)(5) and 9. The original grievance complained that (R. 41)—

> The employees working on induction heating and are performing assembly and wiring; power brake operations; machining operations; and attending to the tool crib and storeroom operations should be in the IUE, Local 130 bargaining unit.

The grievance makes a claim as to how the employees who are doing the work should be classified, not as to who should be doing the work. The petition in support of the motion to compel arbitration complains of the failure to apply the IUE agreement to the employees doing the work. It stakes the union's case upon the recognition clause by which Westinghouse promised to recognize IUE as the representative of, and apply the contract to, all employees in those units for which IUE had been certified by the NLRB. The contract referred specifically to a certification of IUE as the representative of "All production and maintenance employees of the Employer at its Baltimore Works . . . excluding all salaried and technical employees . . . professional employees . . ." IUE's claim

was that the employees in question were ordinary production and maintenance workers. The Company's view, in which the Federation presumably joined, was that the employees in question were not production workers but "salaried and technical employees" or "professional employees" within the meaning of the exception, and so they were within the unit for which Federation was the certified representative. Since the dispute was over the placement of employees and not merely work in one of two units, and the contractual definition of the unit was in the terms of the NLRB certification, it seems to us that the controversy was a representational dispute over which the Board might have jurisdiction not only under Sections 8(b)(4)(D) and 10(k),[22] but also under Sections 8(a)(5) and 9.

It is therefore necessary next to consider whether the NLRB jurisdiction over questions of representation under the latter sections requires an exception to the normal rule that the jurisdiction of the NLRB does not preclude arbitration under, or judicial enforcement of, the terms of a collective bargaining agreement.

---

[22] Sections 8(b)(4)(D) and 10(k) include more than the pure form of jurisdictional dispute defined above, i.e., a dispute between two unions as to who shall perform certain work. They include disputes between a union and an unorganized group of employees (*New London Mills, Inc.*, 91 NLRB 1003). See also *Juneau Spruce Corp.*, 82 NLRB 650, 660 (Member Murdock dissenting). Moreover, occasionally the line between representation and work assignment so overlaps that the Board will decide the former type question in a Section 10(k) proceeding, and *vice versa*. Cf. *Cleveland Pneumatic Tool Co.*, 142 NLRB No. 48, 53 LRRM 1025, with *Gas Service Company*, 140 NLRB No. 45, 52 LRRM 1037. See also *Newark & Essex Plastering Co.*, 121 NLRB 1094, 1109, n. 37.

II

The Jurisdiction of the NLRB Over Questions of Representation Does Not Preclude Arbitration Over the Scope of a Collective Bargaining Agreement Pursuant to Its Terms

A question of representation involving definition of the scope of the bargaining unit—the controversy in the present case for example—may come before the Board in several ways. The aggrieved union might charge the employer with violating Section 8(a) (5) and if its position were sound obtain both an adjudication of a past unfair practice and an order to bargain collectively. *E. I. DuPont De Nemours,* 99 NLRB 390; *Clarostat Mfg. Co.,* 107 NLRB 775; *Perry Coal Co.,* 125 NLRB 1256; *Yutana Barge Lines,* 123 NLRB 1073; *Essex Wire Corp.,* 130 NLRB 450; cf. *Illinois Malleable Iron Co.,* 120 NLRB 451; *Marietta Paint and Color Co.,* 136 NLRB 1530. Either of the rival unions or the employer might, upon motion, obtain a clarification of the certifications, thus laying the foundation for refusal to bargain proceedings. *The Lumber and Millwork Industry Labor Committee,* 136 NLRB 1083; *Blaw-Knox Co.,* 135 NLRB 862; *Western Cartridge Co.,* 134 NLRB 67; *Kennametal, Inc.,* 132 NLRB 194; *St. Regis Paper Co.,* 130 NLRB 1235; *Alpha Corp.,* 128 NLRB 309; *Kennecott Copper Corp.,* 122 NLRB 198; *Levingston Shipbuilding Corp.,* 120 NLRB 205; *Woodward Iron Co.,* 116 NLRB 1639; *Radio Station KHQ,* 111 NLRB 874; *Clarostat Mfg. Co.,* 105 NLRB 20; *Hughes Tool Co.,* 85 NLRB 663.

As a general rule the existence of NLRB remedies does not preclude seeking a judicial or arbitral remedy for the same or an overlapping controversy under the terms of a collective bargaining agreement. The point was squarely decided, we have seen, in *Smith* v. *Even-*

ing News Association. The bare fact that IUE might have sought similar relief under Section 8(a)(5) would not oust the court of jurisdiction to enforce the agreement to arbitrate. There is no reason to give greater significance to availability of a motion to clarify the certification.

Respondent correctly points to several practical and legal differences between a three-sided dispute over the scope of bargaining units and a simple discharge alleged to be in violation of a contract either because of anti-union discrimination or for some other reason such as the lack of just cause. We set forth below our reasons for thinking that the differences, though substantial, are not sufficient to require a difference in jurisdiction. It seems appropriate to point out first, however, that the policies underlying the *Smith* case are also applicable to the present issue.

(1) Although the familiarity of the NLRB as a forum for the resolution of questions of representation undoubtedly reduced the need for judicial remedies and the objections to NLRB proceedings that led Congress to emphasize judicial remedies for breach of collective bargaining agreements, the introduction of exceptions based upon the particular clause of the contract said to be violated or the precise provision of the NLRA that might be invoked would introduce technical niceties productive only of delay and confusion.

The force of this proposition is clearly illustrated by the problems mooted in the present case. The partial jurisdiction of the NLRB over work assignment disputes is not sufficient to oust courts and arbitrators of jurisdiction where a breach of contract is alleged. See pp. 14-23 above. Despite the differences in principle, work assignment disputes and questions of repre-

sentation involving the scope of a bargaining unit are often so formal and narrow as to make it inadvisable to create an artificial need for differentiation by making the distinction decisive of the court's or arbitrator's jurisdiction.[23] The present case, in our view, involves

---

[23] The distinction between a work assignment dispute and a dispute involving the scope of a bargaining unit is significant in other contexts. For example, when a certified union seeks to represent additional employees, alleging that they should be in the unit for which it was certified, the Board treats the question as one involving representation rights and will entertain a motion to clarify the union's certification to resolve its claim. See cases cited p. 24, *supra*. When, on the other hand, a union merely seeks additional work for employees already within its unit, the Board will not entertain such a motion. *General Aniline & Film Corp.*, 89 NLRB 467; *American Broadcasting Co.*, 112 NLRB 605; *Radio Station KHQ*, 111 NLRB 874; *Anheuser-Busch, Inc.*, 116 NLRB 1988; *Employing Plasterers Association of the District of Columbia*, 118 NLRB 17; *Gas Service Co.*, 140 NLRB No. 45, 52 LRRM 1037. Cf. *Communications Workers of America*, 118 NLRB 1104. The rationale underlying the Board's refusal to resolve a work assignment dispute by means of a motion to clarify a certification was stated by it in *Plumbing Contractors Ass'n of Baltimore, Md.*, 93 NLRB 1081, 1087:

> [A] Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. It is true that such certification presupposes a determination that the group of employees involved constitute an appropriate unit for collective bargaining purposes, and that in making such determination the Board considers the general nature of the duties and work tasks of such employees. However, unlike a jurisdictional award, this determination by the Board does not freeze the duties or work tasks of the employees in the unit found appropriate. Thus, the Board's unit finding does not *per se* preclude the employer from adding to, or subtracting from, the employees' work assignments. While that finding may be determined by, it does not determine, job content; nor does it signify approval, in any respect, of any work task claims which the certified union may have made before this Board or elsewhere. [Footnote omitted.]

the definition of the bargaining unit without changing the identity of the employees doing the work, but IUE might well have complained that the assignment of the work in question to technical or professional employees instead of production workers violated the collective bargaining agreement; in the latter event each group of employees would continue to have the same representative but the identity of the men doing the particular jobs would be changed. Indeed, IUE's demand may well achieve such an objective. For, if the employees whom it claimed were covered by its agreement were actually subjected to the contract, they would come under the seniority clause and might well rank lower on the roster than other employees in the unit who had been laid off.[24]

International Association of Machinists v. *Raytheon Mfg. Co.*, 304 F. 2d 365 (C.A. 1), certiorari granted, 371 U.S. 908, judgment vacated as moot, 372 U.S. 523, is another good example, for the dispute was unusually hard to classify. There, although the dispute was on the surface a work assignment question (the Machinists claiming that certain work being performed by electricians represented by the IBEW was in reality work which should be performed by production workers represented by the Machinists), it was in reality part of the long range struggle between craft and industrial unions to secure greater representation rights with

[24] Moreover, it should be noted that IUE states in its petition (Pet. for Cert. 9): "Whatever overtones the Baltimore grievance may carry with respect to the Union's certification, the grievance sought to be arbitrated is a work assignment grievance. The essential question to be answered in arbitration is whether the Company was obligated by its agreement to assign the work in question to employees covered by its agreement with the Union and to apply the terms of the agreement to the performance of this work."

respect to the employees in industrial plants. In *Carey* v. *General Electric Co.*, 315 F. 2d 499, 509 (C.A. 2), petition for certiorari pending, No. 114, this Term, there are three grievances which appear to present the same basic problem; yet one is couched in representation terms, another in work assignment terms, and the third in more general terms.[25]

(2) Although the grievance in the present case apparently turns upon the interpretation of a paragraph quoted from an NLRB certification, many claims under collective bargaining agreements relating to the scope of the unit covered will depend upon the language of the contract rather than any NLRB ruling. Many contracts are negotiated without an NLRB certification, and the question would be what unit did the parties agree to cover by the contract, not what would the NLRB determine was the unit appropriate for an election. An employer and union may expand a unit by adding groups not within the certification, and there are decisions indicating that a union may bind itself not to seek to organize employees who might otherwise be included within a contract unit.[26] The departures

[25] National Docket No. 4114 alleged that the Company violated its agreement with the union in assigning assembly work on military guidance systems to "laboratory technicians," persons outside the bargaining unit, and in declining to recognize the union as their bargaining representative. National Docket Nos. 4606-11 involved the assignment of work normally performed by employees within the bargaining unit to employees in a different unit represented by a different unit. National Docket No. 4922 protested the removal of certain crystal processors from the production and maintenance unit and the conversion of their jobs from hourly pay to salary, without any change in their duties. 315 F. 2d at 508.

[26] *Briggs Indiana Corp.*, 63 NLRB 1270; *Essex County News Co.*, 76 NLRB 1340; *Huron Portland Cement Co.*, 115 NLRB 879.

from NLRB units, when they occur, will, of necessity, be more limited than the obligations imposed by clauses dealing with substantive terms and conditions of employment, but they will be the result of private contract rather than the interposition of involuntary statutory or common law obligations upsetting the balance that Congress struck. The preemption doctrine is not directed at such voluntary, contractual arrangements.

(3) As in the case of the discharges and similar grievances considered in *Smith* v. *Evening News*, ousting an arbitrator of jurisdiction in any case involving a question of representation would frequently fragment questions that ought to be considered whole. Cases like the present often result from the pressure of layoffs for lack of work. The real issue is not which union shall do the bargaining, but which seniority roster shall govern particular jobs. If the grieving union succeeds in obtaining from the Board a clarification of its certificate, it will have won the right to represent those doing the work in question; but that will often be only half the battle. What the union may really be seeking is a right to oust those currently doing the work so that its own laid-off workers can take their places. Whether it has that right—*i.e.*, whether the holders of the disputed jobs, as newcomers to the bargaining unit, become junior to the other employees in the unit—will depend on the seniority clause in the union's contract and may invoke further controversy. See Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 574 (1963). The Board can make only the preliminary determination of the scope of the unit. The actual application of the seniority clause to the individuals concerned, any

questions concerning its interpretation, and any other questions such as the ability of one man or another to do the work would have to go back to arbitration. It is simpler and more expeditious to submit all the questions to arbitration.[27]

(4) The danger of hampering the sound growth of umpireships and voluntary arbitration as a method of resolving disputes under collective bargaining agreements is not substantially less than in the situations envisaged in *Smith* v. *Evening News Association*, 371 U.S. 195. Disputes over the scope of the bargaining unit, the reach of the seniority clause, or the right to perform certain kinds of work are, as we have shown, part of the daily grist of arbitration. The court of appeals concluded that disputes over the scope of the union should not be referred to arbitration because their resolution requires the special expertise of the Board. We think this view denigrates the skill and experience of most arbitrators. The controversies require the application of rather general categories to particular jobs. Detailed knowledge of the character of a few men's jobs and their relation to the company's total activities will usually be more important than basic principles affecting the appropriateness of several possible units. Arbitrators frequently acquire this kind of technical knowledge through experience in other kinds of cases such as job evaluations, work assignments and controversies over qualifications for particular work. They, unlike the Board, can visit the plant and observe the work in question. Grievance

[27] Similarly, in a situation like that in *General Electric*, p. 28, *supra*, it is simpler and more expeditious to let the arbitrator decide all of the grievances, rather than to try to separate out the representation questions from the work assignment questions.

arbitration is often simply an extension of negotiations. It is closer to the parties than a formal administrative proceeding before a board in Washington, and in matters of detail it is likely to be more responsive to their individual needs. Since the representation questions arising under a collective agreement are normally interstitial,[28] the participation of arbitrators will usually supplement rather than derogate from the broader functions of the Board. Indeed, it is the judgment of the Board that they would perform an important service in a period in which the Board's caseload is increasing.[29]

Respondent's primary reason for arguing that the Board must have exclusive jurisdiction is apparently that the Federation will not be bound by the arbitration proceeding. We have already shown that this is not a sufficient reason for denying the courts and arbitrators jurisdiction over disputes concerning work assignments (see pp. 18-21, above). The consideration

---

[28] See e.g., *Hughes Tool Co.*, 85 NLRB 663 (should "battery repairman" be included in unit of electricians or unit of production and maintenance employees?); *Radio Station KHQ*, 111 NLRB 874 (should "announcer-technician" be included in unit of announcers or unit of technical employees?); *Levingston Shipbuilding Co.*, 120 NLRB 205 (should toolroom attendants be included in unit of machinists or unit of production and maintenance employees?); *Kennecott Cooper Corp.*, 122 NLRB 198 (should "field lubrication men" be included in unit of machinists or in unit of production and maintenance employees?); *St. Regis Paper Co.*, 130 NLRB 1235 (should employees engaged in maintenance of powerhouse equipment located outside powerhouse be included in unit of maintenance employees or unit of powerhouse employees?); *Kennametal, Inc.*, 132 NLRB 194 (should employees working in laboratory, but allegedly engaged in production work, be included in unit of production employees?).

[29] See, *Twenty-Seventh Annual Report of the National Labor Relations Board*, 1, 3 (G.P.O., 1963).

tions are no different when the controversy is cast in the form of a controversy over the bargaining unit. The inability of parties and arbitrators to fashion, up to now, a satisfactory procedure for bringing into a single proceeding rival unions each holding its own agreement may lessen the value of the arbitration but not to the point at which Congress can be supposed to have excepted it from the general rule favoring the settlement of disputes over the terms of a collective agreement by the method upon which the parties to the contract have agreed.

It may also be that the arbitrator's decision cannot finally resolve the controversy because the union which is not a party to the collective agreement under which the arbitration is conducted may complain to the Board that the employer's compliance with the arbitrator's award has resulted in disregard of the true meaning of the NLRB certification and a consequent violation of Section 8(a)(5). There are two answers to this contention.

First, although the Board, by virtue of Section 10(a) of the Act (see n. 5, p. 10, *supra*) is free to redetermine the question *de novo*, it is not certain that it will or, if it does, that it will come out with a conclusion contrary to that of the arbitrator. Since the arbitrator was obliged to apply federal law in the resolution of the dispute (*Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448), and decisions of the Board constitute part of the relevant body of federal law, the likelihood that the arbitrator may have applied principles inconsistent with those of the Board is minimized. Where the results reached by the arbitrator are not repugnant to the policies of the Act and he arrived at them on the basis of a full and fair

record, it is possible that the Board, following its practice of according deference to the arbitral process (n. 5, p. 10, *supra*), would accept the arbitrator's resolution of the bargaining unit dispute, even though the Federation was not a party thereto.[30]

Second, even should the Board find it necessary to reach a conclusion contrary to that of the arbitrator—and, in that event, the Board's determination would take precedence[31]—we point out that this danger is not confined to controversies over the scope of a bargaining unit.

Arbitrators are commonly required to interpret a contract within the framework imposed by other legal rights and duties. See Cox, *Place of Law in Labor Arbitration*, 34 Chicago Bar Record 205 (1953). An

---

[30] Cf. *International Harvester Co.*, 138 NLRB No. 88, 51 LRRM 1155 (arbitrator's ruling that employee was delinquent in dues payments to the union and thus subject to discharge under the union security provision of the contract accepted by the Board even though the employee did not participate in the arbitration proceeding, for Board found that the employee's position had been fully presented by the employer); *Raley's, Inc.*, 143 NLRB No. 40, 53 LRRM 1347 (Board held that contract between employer and another union barred an election sought by petitioning union on the basis of an arbitrator's ruling, rendered in a proceeding in which the petitioning union did not participate, that the contract covered the stores sought to be represented by petitioning union).

[31] Section 10(a) of the NLRA; *Carey* v. *General Electric Co.*, 315 F. 2d 499, 509 (C.A. 2), petition for certiorari pending, No. 114, October Term, 1963; Local 174, *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101, n. 9; *Lodge 12, IAM* v. *Cameron Iron Works*, 257 F. 2d 467, 473 (C.A. 5), certiorari denied, 358 U.S. 880; *Doll & Toy Workers* v. *Metal Polishers*, 180 F. Supp. 280 (S.D. Cal.); *Retail Clerks* v. *Montgomery Ward & Co.*, 50 LRRM 2702 (N.D. Ill.), affirmed 53 LRRM 2069 (C.A. 7); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 Col. L. Rev. 269, 298-300 (1959); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 568-569, 570-572 (1963).

award requiring a discharge pursuant to a union shop agreement might result in unfair labor practice charges under Section 8(a)(3), which, if sustained, would result in nullifying the arbitrator's determination. See *International Harvester Co.*, 138 NLRB No. 88, 51 LRRM 1155; *Hershey Chocolate Corp.*, 129 NLRB 1052; *New Britain Machine Co.*, 116 NLRB 645; *Monsanto Chemical Corp.*, 97 NLRB 517; *Hamilton-Scheu & Walsh Shoe Co.*, 80 NLRB 1496; *Paramount Pictures, Inc.*, 79 NLRB 557; see also *S. S. White Dental Mfg. Co.*, 26 LA 428; *Marlin Rockwell Corp.*, 22 LA 651. An award carrying out a seniority clause might have the same consequence.[32] Nor is the

[32] In *General Electric, supra*, p. 28, one of the grievances, National Docket No. 4557, involves a claim by the union that an employee was entitled to a job in preference to another employee because the latter had lost his seniority under a clause of the contract which provided that employees who left the bargaining unit covered by the contract to work in another unit, and then returned, would retain seniority, except where they were transferred to a unit represented by another union. The district court declined to order arbitration of this grievance on the ground that the seniority clause was violative of Section 8(a)(3) of the NLRA (see *National Labor Relations Board* v. *International Association of Machinists*, 279 F. 2d 761 (C.A. 9), certiorari denied, 364 U.S. 890). The Second Circuit, however, held that the withdrawal of this grievance from arbitration was unjustified. First, the arbitrator might resolve the grievance without reaching the clause. Second, the court pointed out (315 F. 2d at 512):

> if the arbitrator does uphold the union's construction of the seniority provision in question, he might himself decline to fashion an award based upon it for fear that he would encourage a practice banned by the labor act. We cannot construct a framework of legal principles governing arbitration on the theory that the arbitrator is ignorant or oblivious of the pronouncements of the Board and the courts. As another alternative . . . the arbitrator might decide that the second sentence, which arguably discriminates against those anxious to exercise rights protected by the act, is severable and should be discarded but that the union's claim is supportable under the first sentence.

problem confined to the NLRB. After World War II, arbitrators were frequently required to determine whether the seniority clause of a labor contract conflicted with veterans' rights to reemployment under the Selective Service Act.[33] State courts have not infrequently vacated awards on the ground that the arbitrator's decision was contrary to an established State policy.[34]

In the present situation, the lack of absolute finality would seem to be an asset rather than a liability. The arbitration proceedings, as we have shown, may be highly effective not only in resolving the issue between the immediate parties to the contract, but also in precipitating a wider solution including any rival union. Many cases will involve the application of settled criteria, incorporated in the Board's definition of the unit, to refined details better handled in the shop. At the same time, the Board would retain the general overriding authority to correct any serious departure from the national labor policy. The process, of course, involves a risk of duplication and inconsistency that may be unappealing to those who insist upon tidy solutions. Labor relations are seldom tidy, however, especially in the area of inter-union jurisdictional disputes, and it is "implicit in the choice Congress made that 'diversi-

---

[33] See *Sullivan Dry Dock & Repair Corp.*, 1 LA 9; *Bell Aircraft Corp.*, 2 LA 22; *Celanese Corp. of America*, 3 LA 765; *Goodyear Tire & Rubber Co.*, 6 LA 924; *Eastern Stainless Steel Corp.*, 7 LA 267; *Adohr Milk Farms*, 8 LA 459.

[34] *Black* v. *Cutter Laboratories*, 43 Cal. 2d 788, 278 P. 2d 905, certiorari dismissed, 351 U.S. 292; *Matter of Western Union Tel. Co.*, 299 NY 177, 86 N.E. 2d 162; *Avco Corp.* v. *Preteska*, 22 Conn. Sup. 475, 174 A. 2d 684; *Smith* v. *Gladney*, 128 Tex. 354, 98 S.W. 2d 351; see also, *Local 453, IUE* v. *Otis Elevator Co.*, 314 F. 2d 25 (C.A. 2).

ties and conflicts' may occur," *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 514.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

STEPHEN B. GOLDBERG,
Attorney,
National Labor Relations Board.

AUGUST 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the repre-

sentative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

* * * * *

TITLE III—SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

★ U. S. GOVERNMENT PRINTING OFFICE 1983—695-281/P.O. 77

LIBRARY
SUPREME COURT, U. S.

No. 21

Office-Supreme Court, U.S.
FILED
SEP 28 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JAMES B. CAREY, as President of the INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

JOHN F. HUNT, JR.,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Attorney for Respondent

JAMES F. SMITH,
3 Gateway Center,
Pittsburgh 30, Pa.

CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Of Counsel.

September 27, 1963

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATUTE INVOLVED	1
QUESTION PRESENTED	2
COUNTER STATEMENT	2
I. THE AGREEMENT	3
II. THE GRIEVANCE	3
III. THE HOLDING BELOW	6
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. THIS CASE IS NOT FORECLOSED BY PRECEDENT: THIS COURT HAS THUS FAR ONLY DECIDED THAT SECTION 301 PERMITS CONTRACT ACTIONS EVEN THOUGH THE ALLEGATIONS OF THE COMPLAINT CHARGE AN UNFAIR LABOR PRACTICE UNDER SECTION 8(a)(3)	10
II. THE UNDERLYING GRIEVANCE HERE SEEKS TO EXPAND THE UNIT FOR WHICH IUE HAS BEEN CERTIFIED AND TO SHRINK THE UNIT FOR WHICH FEDERATION HAS BEEN CERTIFIED IN DEROGATION OF THE STATUTORY RIGHTS OF THE AFFECTED EMPLOYEES	13
III. THE INSTANT DISPUTE CAN BE FULLY RESOLVED BY PROCEEDINGS UNDER SECTION 9	17

PAGE

IV. ALL THE POLICIES OF THE ACT BEARING ON THIS CASE SUPPORT THE RESULT BELOW 20

A. The Rights of the Engineering Laboratory Employees and Respondent's Pervasive Duty of Neutrality: Sections 7, 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1) and 8(b)(2) 21

B. The Duty to Bargain Collectively with the Majority Representative of an Appropriate Unit of Employees: Sections 8(a)(5) and 8(b)(3) 23

C. The Cornerstone of the Labor Relations Scheme of the Act Creating an area in which NLRB's Dispute Resolving Jurisdiction Preempts a Collective Bargaining Agreement Arbitration: Section 9 24

D. Special Implications as to Representation Disputes: Section 10(a) 32

E. Congressional Mandate for Protection of Employers and for Final and Binding Resolution of Inter-Union Disputes: Sections 8(b)(4), 10(k) and 303 32

F. Encouragement of Final and Binding Settlement of Inter-Union Disputes by Agreement between the Rival Unions: Sections 201, 203(d) and 301(a) 36

V. THE PRE-EMPTION CASES SUPPORT THE RESULT BELOW 38

A. The Principle Underlying "Pre-emption" Cases 38

B. The Pre-emption Doctrine and Section 301. 39

C. Factors Relevant to Whether Congress Intended NLRB Exclusivity 42

1. Adjudications of Status under the Act Consistently Held Within Exclusive Jurisdiction of NLRB 42

PAGE

2. Adequacy of Administrative Remedy Supports Inference that Dispute Within Exclusive Jurisdiction of NLRB 43

3. Interest of Other Institutions in Ordering Conduct in Labor Dispute Bears on Congressional Intention as to NLRB Exclusivity 43

4. Attitude of NLRB toward Exercise of its Jurisdiction Irrelevant to Whether such Jurisdiction Exclusive 44

D. The Foregoing Criteria Support a Strong Inference that Congress Intended the Instant Dispute to be Determined Solely by NLRB 44

CONCLUSION 45

APPENDIX

TABLE OF AUTHORITIES

JUDICIAL AND ADMINISTRATIVE DECISIONS

AFL v. *NLRB*, 308 U. S. 401 (1940) 24

Allen-Bradley Local No. 1111, United Electrical Workers v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942) 44

Amalgamated Meat Cutters, 101 N. L. R. B. 181 (1952) 20

Amalgamated Meat Cutters Union v. *Fairlawn Meats, Inc.*, 353 U. S. 20 (1957) 20, 44

Anheuser-Busch Inc., 116 N. L. R. B. 1988 (1956) 19

Atkinson v. *Sinclair Refining Co.*, 370 U. S. 238 (1962) 12

Bell Telephone Co. of Pennsylvania, 118 N. L. R. B. 371 (1957) 26

Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U. S. 767 (1947) 42

PAGE

Borg-Warner Corp., 113 N. L. R. B. 152 (1955) 19

Carey v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963) 11

Chrysler Corp., 129 N. L. R. B. 407 (1960) 19

Cleveland Pneumatic Tool Co., 142 N. L. R. B. No. 48, (1963) 20

Combustion Engineering Co., 86 N. L. R. B. 1265 (1949) 23

Douds v. *Int'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957), *Int'l Longshoremen's Ass'n*, 118 N. L. R. B. 1481 (1957) 15

Dowd Box Co. v. *Courtney*, 368 U. S. 502 (1962) ... 12

Employing Plasterers Ass'n of the District of Columbia, Inc., 118 N. L. R. B. 17 (1957) 19

Enterprise Ass'n of Pipefitters, Local 638, 136 N. L. R. B. 1641 (1962) 18

Freight Drivers and Helpers v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961) 11

Garner v. *Teamsters Union*, 346 U. S. 485 (1953) .. 43

Gas Service Company, 140 N. L. R. B. No. 45 (1963) 20

General Aniline & Film Corp., 89 N. L. R. B. 467 (1950) 19

General Electric Co., 144 N. L. R. B. No. 21 (1963) .. 18

Glaziers Local 1778, Brotherhood of Painters, 137 N. L. R. B. 975 (1962) 18

Guss v. *Utah Labor Relations Board*, 353 U. S. 1 (1957) 44

Haspel v. *Bonnoz, Singer & Hand Embroiderers Union*, 112 F. Supp. 944 (S. D. N. Y. 1953) 33

Houdaille Industries, Inc., 35 Lab. Arb. 455 (1960) 31

ILGWU v. *NLRB*, 366 U. S. 731 (1961) 22

Incres Steamship Co. v. *I. M. W. U.*, 372 U. S. 24 (1963) 40

Int'l Ass'n of Machinists v. *Gonzales*, 356 U. S. 617 (1958) 43

PAGE

Int'l Chemical Workers Union v. *Olin Mathieson Chemical Corp.*, 202 F. Supp. 363 (S. D. Ill. 1962) 11
Int'l Hod Carriers Union, Local 231, 91 N. L. R. B. 598 (1950) 29
Int'l Longshoremen's & Warehousemen's Union, 94 N. L. R. B. 388 (1951) 29
Int'l Longshoremen's & Warehousemen's Union v. *Juneau Spruce Corp.*, 342 U. S. 237 (1952) 33
Internat'l Union, U. A. W. v. *Wisconsin Employment Relations Board*, 336 U. S. 245 (1949) 44
Lacrosse Tel. Corp. v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949) 42
Leedom v. *Kyne*, 358 U. S. 184 (1958) 24
Local 3, Metal Polishers Union, 142 N. L. R. B. No. 48 (1963) 19
Local 26, Int'l Fur Workers, 90 N. L. R. B. 1379 (1950) 20
Local 174, Teamsters Union v. *Lucas Flour Co.*, 369 U. S. 95 (1962) 12
Local No. 207, Int'l Ass'n of Bridge Workers Union v. *Perko*, 373 U. S. 701 (1963) 42
Local 825, Int'l Union of Operating Engineers, 137 N. L. R. B. 1425 (1962) 29
Local 991 Int'l Longshoremen's Ass'n, 137 N. L. R. B. 750 (1962) 19
Local 1357, Retail Clerks Int'l Ass'n v. *Food Fair Stores, Inc.*, 202 F. Supp. 322 (E. D. Pa. 1961) .. 11
Local 1505 Int'l Brotherhood of Electrical Workers v. *Local Lodge No. 1836 of Dist. 38 of the Ass'n of Machinists*, 304 F. 2d 365 (1st Cir. 1962) 10, 42
Local 1622, United Brotherhood of Carpenters, 139 N. L. R. B. No. 43 (1962) 18
Lodge 12, Int'l Ass'n of Machinists v. *Cameron Iron Work, Inc.*, 257 F. 2d 467 (5th Cir. 1958) 10, 11
Long Island News Corp., 35 Lab. Arb. 840 (1960) .. 31

PAGE

Madison Glass Specialty Co., Inc. v. *Display Fixture, Smoking Pipe, Plastics and Production Workers Union*, 43 Lab. Cas. Par. 17,086, 146 N. Y. L. J., July 3, 1961 (Sup. Ct., N. Y. Cty.) 11

Marine Engineers Beneficial Ass'n v. *Interlake Steamship Co.*, 370 U. S. 173 (1962) 28, 42

Midwest Conveyor Company, Inc., 116 N. L. R. B. 580 (1956) 19

Midwest Piping and Supply Co., 63 N. L. R. B. 1060 (1945) 25

National Steel & Shipbuilding Co., 40 Lab. Arb. 625 (1963) 31, 38

Nepco Unit of Local 95, Office Employees Int'l Union v. *Nekoosa-Edwards Paper Co.*, 287 F. 2d 452 (7th Cir. 1961) 14

Newark & Essex Plastering Co., 121 N. L. R. B. 1094 (1958) 20

New York Mailers' Union v. *New York Times*, 43 Lab. Cas. Par. 17,309, 146 N. Y. L. J. October 28, 1961, p. 12 (Sup. Ct., N. Y. Cty.) 11

New York Mailers' Union v. *Publishers' Ass'n of New York City*, 43 Lab. Cas. Par. 17,310, 146 N. Y. L. J., Nov. 28, 1961, p. 13 (Sup. Ct. N. Y. Cty.) 11

N. L. R. B. v. *Radio and Television Broadcast Engineers*, 364 U. S. 573 (1961) 35

N. L. R. B. v. *United Ass'n of Journeymen and Apprentices of the Plumbing Industry*, 242 F. 2d 722 (3d Cir. 1957) 19

Novak Logging Co., 119 N. L. R. B. 1573, 1574 (1958) 25

Pacific Tile and Porcelain Co., 137 N. L. R. B. 1358 (1962) 30

Pittsburgh Plate Glass Co. v. *NLRB*, 313 U. S. 146 (1941) 24

Plumbing Contractors Ass'n of Baltimore, 93 N. L. R. B. 1081 (1951) 19

PAGE

Printer's Pressmen's Union, 143 N. L. R. B. No. 24 (1963) 18

Raley's Inc., 143 N. L. R. B. No. 40 (1963) 16, 29
Rayonier, Inc., 36 L. A. 883 (1961) 31
Retail Clerks v. *Schermerhorn*, 373 U. S. 746 (1963) 40
Retail Clerks Union v. *Thriftimart, Inc.*, 30 Cal. Rep. 13, 280 P. 2d 652 (1963) 11

San Diego Building Trades Council v. *Garmon*, 359 U. S. 236 (1959) 9, 40
Smith v. *Evening News Ass'n*, 371 U. S. 195, 197-98 (1963) 6, 10, 11, 12, 40, 41, 42
Spielberg Mfg. Co., 112 N. L. R. B. 1080 (1955) 29

Textile Workers v. *Lincoln Mills*, 353 U. S. 448 (1957) 12, 31

UAW, Local 291, 92 N. L. R. B. 968 (1950) 23
UAW v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1956) 44
United Construction Workers v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954) 43
United Steelworkers of America v. *American Mfg. Co.*, 363 U. S. 564 (1960) 12
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 12
United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) 12

Weber v. *Anheuser-Busch Inc.*, 348 U. S. 468 (1955) 44
Westinghouse Electric Corp., 144 N. L. R. B. No. 49 (1963) 18

STATUTES

PAGE

Labor Management Relations Act, 1947, 61 Stat. 136 *et seq.*, *as amended* 29 U. S. C. §§ 141 *et seq.* (Supp. 1959-60), 29 U. S. C. A. §§ 141 (Supp. 1960) *et seq.*

§ 7 ..... 7, 14, 16, 19, 21, 22, 39
§ 8 ..... 7, 39
§ 8(a)(1) 21, 22
§ 8(a)(2) 21, 22
§ (a)(3) 7, 10, 21
§ 8(a)(5) 23, 32
§ 8(b)(1) 21, 22
§ 8(b)(2) 21, 22
§ 8(b)(3) 23, 32
§ 8(b)(4) 9, 15, 32, 33, 34, 35
§ 9 ..... 7, 8, 15, 17-22, 24, 25-27, 30, 32
§ 10(a) 32
§ 10(k) 9, 18, 19, 20, 32, 33, 34, 35, 36
§ 201 ..... 9, 36, 37
§ 203(d) 36, 37
§ 301 ..... 6, 7, 9, 12, 25, 33, 34, 36, 37, 38, 39, 40
§ 303 ..... 9, 32, 33

TEXTUAL MATERIALS

Summers, *Labor Law Decisions of the Supreme Court 1962 Term*, Daily Labor Report No. 168 (August 28, 1963) 39

Recent Cases, 71 Harv. L. Rev. 1364 (1958) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,
v.
WESTINGHOUSE ELECTRIC CORPORATION
Respondent.
No. 21

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

Statute Involved

In addition to the sections of the Labor Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136-62, as amended by Act of September 14, 1959, 73 Stat. 525-45, 29 U. S. C. Sections 141 *et seq.*, hereinafter referred to as the Act) cited by petitioner (who is suing in his capacity as President of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE)) in his brief (PB), respondent submits that the following sections of the Act are involved in this case: Sections 7, 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1), 8(b)(2), 8(b)(3), 8(b)(4)(B), 8(b)(4)(C), 303(a)(3), 303(a)(4) and 303(b). Those additional sections are set forth in an appendix.

Question Presented

In an action governed by Section 301 of the Act, where

(i) a union seeks to enforce against an employer a clause of their collective bargaining agreement which obligates the employer to submit to arbitration unsettled grievances involving the interpretation, application or claimed violation of the agreement,

(ii) the unsettled grievance in question is a claim by the union that, in respect of a particular department at one of employer's plants, the employer has violated a clause of the agreement which requires that the union be recognized for those units where through a lawful NLRB certification it has been lawfully designated as exclusive bargaining representative,

(iii) a rival union, which presently represents the employees of such department, has a collective bargaining agreement with the employer which has a similar arbitration clause and a similar recognition clause and

(iv) NLRB has found appropriate two mutually exclusive bargaining units at the plant in question and has certified the complaining union for one such unit and the second union for the other,

should not the court requested to enforce the arbitration clause first referred to decline to do so, leaving the dispute to resolution by NLRB in a manner binding on the two rival unions?

Counter Statement

Respondent accepts petitioner's statement of *"The Proceeding"* below. Respondent would supplement and/or

correct petitioner's statement as to *"The Agreement"*, *"The Grievance"* and *"The Holdings Below"*.

I. THE AGREEMENT

The arbitration clause of the collective bargaining agreement between IUE and respondent (the IUE Agreement) (Section XIV-A, pp. 41-45, of the instrument bound into the Record at page 77) recognizes that (i) not all grievances subject to the contractual grievance machinery (Section XIV) will be arbitrable, (ii) in the event of a dispute over arbitrability the decision of a court should be controlling and (iii) pending such decision, arbitration should not be proceeded with. See Paragraph C(5) of Section XIV-A, p. 43. The IUE Agreement further provides that if there be an unsettled dispute which is not arbitrable (or, indeed, if the employer should even question arbitrability) the union shall be free to authorize a strike notwithstanding the general "no strike" clause. See Section VI-B, p. 4. The recognition clause (Section I, pp. 1-2) is stated as an obligation to recognize the union "for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative . . ." and sets forth such units in an appendix. The production and maintenance unit at respondent's Baltimore Works is set forth as Item 1 of such appendix, p. 90.

II. THE GRIEVANCE

The employees at issue in the grievance are those who work in the engineering laboratory at respondent's Baltimore Works (Rec. 29, ff. 69-70). At all relevant times they have been represented by, and are largely members of, Federation of Westinghouse Independent Salaried Unions

(Federation) (*ibid.*) which is the certified bargaining representative of a unit at that plant (Rec. 27, f. 70) determined by NLRB to consist of "All salaried, technical, office and office clerical employees . . . but excluding . . . all production and maintenance . . . employees" (Rec. 30, f. 72). Federation was certified by NLRB as a result of an election in which the then engineering laboratory employees voted (and they did not vote in the production and maintenance unit election which resulted in certification of IUE) (Rec. 27-29, ff. 67-69).

The collective bargaining agreement between respondent and Federation (the Federation Agreement) contains a recognition clause identical with that of the IUE Agreement except, of course, for the unit descriptions in the appendices (Rec. 30-31, ff. 71-72). The Federation Agreement also contains an arbitration clause in all material respects identical with the arbitration provisions of the IUE Agreement (*ibid.*).

The engineering laboratory is a department of the Baltimore Works which develops experimental models and pilot equipment and, accordingly, some of its workmen have job descriptions generally similar to those found on the production line (Rec. 26-27, f. 66). However, a laboratory machinist must possess a greater degree of skill and knowledge than a production line machinist (*ibid.*).

As the IUE and Federation Agreements show, IUE's and Federation's respective unit definitions and the recognition clauses of their respective collective bargaining agreements with respondent are *mutually exclusive*. Petitioner's production and maintenance unit specifically excludes all salaried technical workers and Federation's salaried technical unit specifically excludes all production and maintenance workers. Respondent has always treated the employees of the Baltimore Works departments as in the IUE unit or

the Federation unit on the basis of whether the then employees of such departments voted in the IUE election or the Federation election (Rec. 28-29, f. 69).

It is also clear from the language of those recognition clauses that there was no bargaining with either rival union in respect to respondent's recognition obligations. Both recognition clauses simply refer to units which the unions are statutorily entitled to represent and in respect of which respondent is statutorily obligated to recognize the unions. Furthermore, consistent with the statutory significance of NLRB certifications, those recognition clauses do not purport to assign work, but only to describe the classes of employees covered by the respective collective bargaining agreements. This is the scheme of representation and the type of collective agreement long established in industrial unionism, as distinguished from the scheme of craft unionism and the type of collective agreement found, for example, in the construction trades.

Petitioner's introduction (PB 4-5) to the quotation of the original grievance is not supported by the quotation itself, for the grievance did not protest respondent's refusal to apply the IUE Agreement "to the performance of work on induction heating [etc.]" but to "the employees working on induction heating [etc.]". Furthermore, IUE never claimed, prior to the petition for certiorari, that the grievance was a work assignment grievance, but consistently described it as a protest of respondent's refusal to apply the IUE Agreement to the engineering laboratory employees; see Rec. 12, f. 24, 14, f. 27, 16, f. 40, 35, f. 103 (affidavit to Special Term of an IUE vice-president: the grievance "merely involves a violation by the Company of the rights of the Union to represent the employees who perform production and maintenance work . . ."). The thrust of the grievance, according to a sworn statement of

an IUE officer, was not to alter the identity of the people working in the engineering laboratory, but a charge that respondent had transferred workers from the production line to the laboratory and that such transferred workers should have "the benefits of the [IUE] contract" (Rec. 36, f. 104). This plainly means that those workers should be included in the IUE unit and that they should be represented by IUE for collective bargaining purposes rather than by Federation. Petitioner's present attempt to convert the grievance into a demand for more work for people it presently represents is not only not supported by the record it is impeached by facts made of record by petitioner.

The brief of the United States as *amicus curiae* (SGB) agrees that the grievance raises a "dispute over questions of representation requiring more precise definition of the bargaining unit" (SGB 14).

III. THE HOLDING BELOW

The New York courts at all three levels confirmed that the grievance sought to enlarge the IUE bargaining unit at the expense of Federation (Rec. 47, f. 124, 48-49, f. 125-26, 58, f. 142, 66, ff. 154-55—and the dissenting opinions recognized this as the nature of the grievance, Rec. 60, f. 146 and 68, f. 156). Indeed, the nature of the grievance was not even in issue in the New York Courts, petitioner himself treating the contract interpretation issue he was asserting as raising matters of representation and unit definition.

SUMMARY OF ARGUMENT

Existing decisions of the Court under Section 301 of the Act do not foreclose the issue in this case. *Smith* v. *Evening News Association*, 371 U. S. 195 held that a claim of breach of a collective bargaining agreement may be en-

forced under Section 301 even though the challenged conduct would also constitute an unfair labor practice cognizable by NLRB under Section 8(a)(3), but the Court expressly reserved decision as to agency exclusivity in other situations.

The grievance in issue here, however phrased or rephrased, seeks to "clarify" the unit of employees in respect of which IUE has been certified as bargaining representative to include a class of employees hitherto treated as included in the NLRB determined unit for which Federation has been certified as bargaining representative. If IUE is successful in its grievance it will have obtained representational status in respect of such class of employees without the individuals included in that class having had any voice in the selection of IUE as their bargaining representative. Bilateral arbitration of this grievance under the collective bargaining agreement between IUE and respondent cannot be a final and binding resolution of the dispute for it will bind neither the rival union nor the employees affected. Indeed, such an arbitration award is conducive of further strife and will require further adjudications including ultimate adjudication by NLRB.

Under any phrasing or rephrasing of the instant grievance, the underlying dispute can be effectively resolved by proceedings under Section 9 of the Act. An NLRB determination that the engineering laboratory employees as a class are properly included in the production and maintenance unit will effectively give IUE all the ultimate relief it is entitled to seek and will be effective to exclude such class of employees from the NLRB determined Federation unit.

All relevant policies of the Act speak against the result petitioner seeks.

Sections 7 and 8 accord employees the right to have a voice in the choice of their bargaining representative by

balloting as part of an appropriate unit of employees and require the employer to be completely neutral as between two unions seeking to represent employees. A variety of statutory rights and obligations of employers and of unions depend upon a union's majority status in an appropriate unit of employees, including the fundamental right and duty to be bargained with, and to bargain, collectively.

Section 9 entrusts controversies between two certified unions over the contents and propriety of their respective units to NLRB. Policies favoring voluntary recognition, etc. are inapplicable where, as here, the employer has recognized and bargained collectively with IUE and Federation in respect of their NLRB determined units. Proceedings under Section 9 will result in a final adjudication of the underlying dispute here in a manner binding on both unions and the affected employees and with full protection of employee rights under the Act and full implementation of all other applicable statutory policies. While IUE's success in a Section 9 proceeding would give rise to ancillary collective bargaining agreement problems in respect of the engineering laboratory jobs, any other method of adjudication would foreseeably give rise to an even greater number of disputes and disputes which, should NLRB disagree with the bilateral arbitration award, will prove to have been unnecessary. NLRB cannot fairly defer to a bilateral contract arbitration award in this case because Federation will not have been represented in the arbitration proceedings (and existing NLRB precedent relating to arbitration awards shows that the IUE award could not be deemed to bind Federation). The contract arbitrator here is not bound by NLRB standards established under Section 9 and arbitrators seem to agree that arbitration between one rival union and an employer is not a felicitous method of resolving disputes between two rival unions.

Sections 8(b)(4), 10(k) and 303 evidence a clear policy that employers should not be harassed or prejudiced by inter-union rivalries (and Section 10(k) encourages inter-union agreements and arbitrations in respect of the type of inter-union disputes dealt with by that Section).

Sections 201, 203(d) and 301(a) are relevant here in support of the decision below because they show the Congressional espousal of collective bargaining agreement arbitration to be applicable where, unlike here, such an arbitration would be a final and binding resolution of the basic dispute. The Congressional policy in respect of inter-union disputes favors agreements and arbitration submissions by the two rival unions. Implementation of Congressional policy here would seek to encourage inter-union agreements and arbitration submissions by precluding one union from seeking to gain advantage, however temporary, from an arbitration award against the employer contractually binding the employer to deem IUE's NLRB determined unit to include, and Federation's NLRB determined unit to exclude, the engineering laboratory employees.

The "pre-emption" doctrine, articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 and related cases, establishes that, in certain types of labor situations, it is to be inferred from the Act either that Congress did not intend the conduct involved to be ordered other than by NLRB or that, in light of the overall scheme of the Act, a proper allocation of functions among the various institutions and agencies concerned with labor relations requires that NLRB be the exclusive forum in respect of the conduct involved. Existing pre-emption cases show that the foregoing inferences are warranted when the underlying dispute involves fundamental questions of status under the Act, when the agency remedy provided by the

Act is adequate when the public interest in resolution of the dispute by NLRB outweighs any interest in resolution by the competing institution. Considerations of NLRB workload and its own attitude toward exercise of its jurisdiction are irrelevant. These criteria, applied to the facts of this case, support affirmance of the result below.

ARGUMENT

I. THIS CASE IS NOT FORECLOSED BY PRECEDENT: THIS COURT HAS THUS FAR ONLY DECIDED THAT SECTION 301 PERMITS CONTRACT ACTIONS EVEN THOUGH THE ALLEGATIONS OF THE COMPLAINT CHARGE AN UNFAIR LABOR PRACTICE UNDER SECTION 8(a)(3)

The Court expressly noted in *Smith* v. *Evening News Ass'n*, 371 U. S. 195, 197-98, that, should serious problems arise from situations involving both NLRB and judicial (arbitral) jurisdiction over acts which amount to an unfair labor practice, such problems will be faced as they arise. Since certain "unfair labor practice" grievances were reserved in *Smith, a fortiori,* the situation as to grievances seeking redeterminations of NLRB determined units of employees is an open one.

Prior to *Smith*, and in the face of *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467 (5th Cir. 1958), which anticipates *Smith,* the lower courts consistently held that bi-lateral arbitration of certification disputes would not be ordered in cases governed by Section 301 (and most of such holdings were on the theory that such an arbitration would deprive affected employees of their rights under the Act, increase rather than allay industrial strife and be basically unfair to the employer). See *Local 1505 Int'l Brotherhood of Electrical Workers* v. *Local Lodge No. 1836 of Dist. 38 of the Ass'n of Ma-*

chinists, 304 F. 2d 365 (1st Cir. 1962) (*Raytheon*); *Int'l Chemical Workers Union* v. *Olin Mathieson Chemical Corp.*, 202 F. Supp. 363 (S. D. Ill. 1962); *Local 1357, Retail Clerks Int'l Ass'n* v. *Food Fair Stores, Inc.*, 202 F. Supp. 322 (E. D. Pa. 1961); and *Madison Glass Specialty Co., Inc.* v. *Display Fixture, Smoking Pipe, Plastics and Production Workers Union*, 43 Lab. Cas. Par. 17,086, 146 N. Y. L. J., July 3, 1961 (Sup. Ct., N. Y. Cty.). In the case of work assignment grievances, of the few cases reported, the majority have also held against arbitrability (compare *New York Mailers' Union* v. *New York Times*, 43 Lab. Cas. Par. 17,309, 146 N. Y. L. J. Oct. 28, 1961, p. 12 (Sup. Ct., N. Y. Cty.) and *New York Mailers' Union* v. *Publishers' Ass'n of New York City*, 43 Lab. Cas. Par. 17,310, 146 N. Y. L. J., Nov. 28, 1961, p. 13 (Sup. Ct. N. Y. Cty.) with *Freight Drivers and Helpers* v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961).

Since *Smith*, the Court of Appeals for the Second Circuit in *Carey* v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963) and the California Supreme Court in *Retail Clerks Union* v. *Thriftimart, Inc.*, 30 Cal. Rep. 13, 280 P. 2d 652 (1963), have read that decision as requiring a different result in respect of the facts of those cases (although the latter case vacated the arbitrator's award because it affected, though it did not purport to bind, a third party not privy to the arbitration agreement or the proceedings pursuant to it).

However, commencing in Special Term, respondent has always stipulated (drawing a clear distinction between "unfair labor practice grievances" and "representational grievances") the doctrine of *Cameron Iron Works, supra, viz.*, that a grievance is not non-arbitrable merely because it involves conduct which would also constitute grounds for certain types of unfair labor practice charges before NLRB.

The interpretation of the Act articulated in *Smith* was assumed by the judges below and they nevertheless held the instant grievance non-arbitrable under the circumstances of this case; see Rec. 59, f. 142.

Nor is the present case foreclosed by *Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (§ 301 does not pre-empt state court jurisdiction over actions on collective bargaining agreements), *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95 (state courts must apply federal law in such actions) and *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (employer may sue on no strike clause even though related employee grievances pending arbitration). To be sure, the Court noted in *Lucas Flour* (369 U. S. at 101, n. 9) and *Sinclair* (370 U. S. at 245, n. 5) that the pre-emption doctrine is inapplicable to contract actions, but those remarks were in contexts far removed from the present issue. Indeed, the reservation in the Court's opinion in *Smith* (referred to above) establishes that the present issue is not foreclosed by any existing Section 301 case.

The present issue is one of first impression in this Court, not controlled by *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, the *Steelworkers* cases (*United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593) or any other Section 301 case which implements Congressional policy favoring enforcement of collective bargaining agreements. As the remainder of this brief demonstrates, should a collective bargaining agreement arbitrator be permitted to exercise concurrent jurisdiction with NLRB over the instant grievance, problems of the most serious nature will arise—problems for which no fair and orderly solution is

available. Thus, one of the situations reserved in *Smith* v. *Evening News* must now be resolved and respondent submits that the only resolution consistent with the scheme of the Act is affirmance of the decision below.

II. THE UNDERLYING GRIEVANCE HERE SEEKS TO EXPAND THE UNIT FOR WHICH IUE HAS BEEN CERTIFIED AND TO SHRINK THE UNIT FOR WHICH FEDERATION HAS BEEN CERTIFIED IN DEROGATION OF THE STATUTORY RIGHTS OF THE AFFECTED EMPLOYEES

Both opposing briefs postulate a division of inter-union disputes between "representational" disputes and "work assignment" disputes. On the basis of this compartmentalization both briefs submit that, whether the unsettled grievance here be characterized as a representational dispute or a work assignment dispute, the decision below should be reversed. Respondent submits that, under either of those characterizations or any other characterization, the fundamental nature of the grievance is such that the decision below should be affirmed.

Both opposing briefs recognize (petitioner's brief by its over strong protests) that the "work assignment" thrust to the grievance as it hitherto existed is new wine. But whatever the vintage, it is the old bottle which is relevant to decision here.

Initially, it seems useful to reiterate that, as the brief of the United States agrees (SGB 14), on the basis of the record in this case, the instant grievance seeks an interpretation of the content of the unit for which IUE has been certified, necessarily affecting the content of the unit for which Federation has been certified and necessarily extending IUE's representational status to a new group of employees who have not chosen IUE as their bargaining representative.

Petitioner, however, submits that the grievance should be treated as a work assignment grievance because (i) it could originally have been framed as a work assignment dispute and (ii) shop stewards cannot be expected to plead precisely (citing *Nepco Unit of Local 95, Office Employees Int'l Union* v. *Nekoosa-Edwards Paper Co.*, 287 F. 2d 452 (7th Cir. 1961)).

Precision of "pleading" has never been at issue in this case. The original grievance (presented in 1958) is cited by respondent as only the beginning of a long and consistent chronology which shows that the whole idea that the grievance was attempting to get more work for persons presently in the IUE unit was only introduced in the petition for certiorari (1962). As the record shows, the thrust of the grievance as one of unit definition and enlargement of representational status was understood by both parties for over four years. That understanding was reflected in the petition and supporting affidavits to Special Term (surely not drawn by shop stewards) and, under the reasoning of *Nepco*, the understanding of the parties over the four years in question ought to control the present understanding of the grievance.

In any event, respondent submits that IUE's attempt to re-state its grievance at this time is *irrelevant*. Critical to decision here is the nature of the dispute in terms of the stated objective of the grievance, available remedies under the Act, impingement on the statutory rights of the employees affected, impact on the two rival unions and the employer and the foreseeable consequences of bi-lateral collective bargaining agreement arbitration as opposed to NLRB determination. Neither opposing brief comes to grips with the basic nature of the underlying dispute in terms of the statutory scheme and both opposing briefs significantly omit any reference to Section 7 of the Act and

the statutory rights of the primary legislative beneficiaries —employees.

Notwithstanding petitioner's re-definition of the instant grievance as a "work assignment dispute", according to petitioner's own present articulation of it, it is a grievance in which IUE seeks the application of the IUE Agreement "to the employees and the work" (PB 5). Application of the IUE Agreement to the employees doing the engineering laboratory work means recognizing IUE as their exclusive bargaining agent and ceasing to recognize Federation in respect of such employees. It also means that a group of employees, in existence at the time of IUE's election as representative of the production and maintenance unit, who have never had an opportunity to accept or reject IUE as their bargaining representative (and who have in fact participated in an election which chose Federation as their bargaining representative) will suddenly find themselves represented by IUE. Thus, the objective of the IUE grievance, under the circumstances, is totally repugnant to the policies of the Act. The Act makes it quite clear that (i) the only method by which a union may become the bargaining representative of a class of employees is by having the approval of a majority of employees within an appropriate grouping of employees and (ii) the main criterion for appropriateness of the grouping is whether it assures the employees "the fullest freedom in exercising the rights guaranteed" by the Act (Section 9(b)). The only legal means by which IUE can seek the objective of its grievance is a proceeding under Section 9 of the Act. It would be clearly illegal for IUE to seek this objective by coercion on respondent (Section 8(b)(4)(i)(B)) or by insisting that respondent bargain with it in respect of that objective (*Douds* v. *Int'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957); *Int'l Longshoremen's Ass'n*, 118

N. L. R. B. 1481 (1957)). Nevertheless, IUE now seeks to achieve that objective through an arbitration proceeding under the IUE Agreement, candidly admitting that it is seeking an arbitrator's construction of the recognition clause—an incorporation by reference of NLRB's certification order in respect of the production and maintenance unit.

Furthermore, respondent is obligated by the Act and by the Federation Agreement to deal with Federation in respect of the NLRB determined salaried technical unit and, since NLRB has certified IUE and Federation for mutually exclusive units, respondent can only deal with IUE in respect of the NLRB determined production and maintenance unit. Thus the thrust of the IUE grievance is to seek from an arbitrator under the IUE Agreement a construction of its NLRB determined unit to include the engineering laboratory employees and, necessarily, a construction of the NLRB determined Federation unit to exclude them.

Under any comprehension of the underlying grievance here, the ruling of a contract arbitrator will affect employee rights under Section 7 of the Act and (i) if IUE obtains the award it seeks drive Federation either toward *its* contract arbitrator (facing respondent with conflicting arbitration awards) or to NLRB. The dispute almost unquestionably must eventually come before NLRB and when it does the agency cannot fairly defer to an arbitration award which was rendered in a proceeding to which one of the rival unions was not a party (see the discussion of *Raley's, Inc.*, 143 N. L. R. B. No. 40 (1963), *infra*). When the agency arrives at its conclusion the prior arbitration award will be without further effect (and all ancillary collective bargaining agreement disputes arising from the award petitioner now seeks, such as whether the skills of a present engineering laboratory machinist entitle him to continue at work notwithstanding his lack of seniority vis-a-vis existing production line machinists and how the IUE

Agreement can be applied to engineering laboratory operations and employees in light of the fact that it was negotiated without reference to that department and an established set of applicable customs is lacking) will have to be determined or re-determined on the basis of NLRB's decision.

Under any characterization of the instant grievance, should IUE prevail here and in the arbitration it seeks, unless respondent refuses to abide by the award, (i) Federation will lose and IUE will gain representation without any choice having been exercised by the engineering laboratory employees, (ii) respondent will be subject to an unfair labor practice charge by Federation and/or a demand for arbitration under the Federation Agreement and (iii) the present engineering laboratory employees, if thrown out of work to their financial detriment and that of their families, may bring unfair labor practice charges or damage actions against respondent. During such an interval, the dislocated employees may drift to other industries, with a permanent loss of their skills to their present industry and to the detriment of the efficiency of production at the Baltimore Works. If the dispute were first and finally put to NLRB, in the event of petitioner's success certain of the foregoing consequences could ensue but the resolution would be final and binding on all parties, there would be no interim period of industrial chaos and the resolution would reflect the application of national labor policy and the protection of employee rights by the expert agency chosen by Congress—not an interpretation of the IUE Agreement.

III. THE INSTANT DISPUTE CAN BE FULLY RESOLVED BY PROCEEDINGS UNDER SECTION 9

Since IUE's own statement of its grievance asks that the definition of the production and maintenance unit be deemed to include engineering laboratory employees, it

seems to go without saying that that relief can be had from NLRB under Section 9 (by motion to clarify existing units or by a representation proceeding if the agency should conclude that IUE is seeking a change from the *status quo* at the time of IUE's prior certification or that, because of the number of employees involved, a new election is required; see *General Electric Co.*, 144 N. L. R. B. No. 21 (1963) and *Westinghouse Electric Corp.*, 144 N. L. R. B. No. 49 (1963)).

Nevertheless, petitioner now seems to be contending that, if it were relegated to agency procedures, it could obtain the relief it seeks only by NLRB action under Section 10(k). Conceding, *arguendo*, that what petitioner now seeks is the allocation of work presently performed in the engineering laboratory to people in the production and maintenance unit, it is nevertheless the case that such relief can and, on the present facts, should be had in a Section 9 proceeding.

When a dispute is presented to NLRB under Section 10(k), the agency says that it does not award work to a union or to its members as such, but simply determines that disputed work is properly the function of *a class of employees* represented by a particular union. See, *e.g.*, *Printing Pressmen's Union*, 143 N. L. R. B. No. 24 (1963); *Local 1622, United Brotherhood of Carpenters*, 139 N. L. R. B. No. 43 (1962); *Glaziers Local 1778, Brotherhood of Painters*, 137 N. L. R. B. 975 (1962); *Enterprise Ass'n of Pipefitters, Local 638*, 136 N. L. R. B. 1641 (1962). At the same time, when an inter-union dispute is presented to NLRB under Section 9, the agency articulates its concern as finding an appropriate *class of employees* for purposes of bargaining representation but also states that such a finding does not constitute an assignment of work to, or the freezing of the work or work tasks of, the employees

of the unit in question) see *Employing Plasterers Ass'n of the District of Columbia, Inc.*, 118 N. L. R. B. 17 (1957); *Plumbing Contractors Ass'n of Baltimore*, 93 N. L. R. B. 1081 (1951); *General Aniline & Film Corp.*, 89 N. L. R. B. 467 (1950).

While the distinction referred to is, and is admitted to be, difficult of application (see *NLRB* v. *United Ass'n of Journeymen and Apprentices of the Plumbing Industry*, 242 F. 2d 722 (3d Cir. 1957)), the difficulty either does not arise or is academic when, as here, an alleged work dispute is between two certified unions. In such cases a clarification of unit definitions under Section 9 is both an appropriate and an adequate method of resolving the dispute. This is so because NLRB's decisional approach in Section 9 cases inevitably involves the question of work. See, *e.g.*, *Chrysler Corp.*, 129 N. L. R. B. 407 (1960); *Anheuser-Busch, Inc.*, 116 N. L. R. B. 1988 (1956); *Midwest Conveyor Company, Inc.*, 116 N. L. R. B. 580 (1956) and *Borg-Warner Corp.*, 113 N. L. R. B. 152 (1955). And the agency's approach in Section 10(k) cases between certified units inevitably involves unit coverage. See, *e.g.*, *Local 991 Int'l Longshoremen's Ass'n*, 137 N. L. R. B. 750 (1962) (the work of loading dry resins in special containers aboard ship from plant dock assigned to plant's production and maintenance unit, rather than longshoremen's unit which had work of loading resins before containerization; NLRB observing that, had container dock been in operation at the time of production and maintenance unit certification, employees working at the dock would have been included in that unit). Similarly, work assignments as between certified unions involve their representational status and the rights of employees under Section 7. *Local 3, Metal Polishers Union*, 142 N. L. R. B. No. 48 (1963) (dispute between Metal Polishers and Employees Association as to

the assignment of "snagging"; employer's contract with latter purported to cover snaggers but provided no job description and the actual job eventually became indistinguishable from skilled work done by metal polishers; NLRB concluded that single unit of metal polishers and snaggers was appropriate, a Section 9 conclusion, but, the case having arisen under Section 10(k), entered its work assignment order without prejudice to a representational election).

It has been noted that "cases in which both unions are certified by the Board and represent segments of the employer's work force and when the dispute is over an ambiguous area of representation . . . have been handled in the past as questions of the definition of bargaining units", Recent Cases, 71 Harv. L. Rev. 1364, 1366 (1958) (citing *Amalgamated Meat Cutters*, 101 N. L. R. B. 181 (1952) and *Local 26, Int'l Fur Workers*, 90 N. L. R. B. 1379)).

Respondent believes that the brief of the United States concedes that relief is available to petitioner here in a proceeding under Section 9: "the Board will decide the former type question [unit coverage] in a Section 10(k) proceeding, and *vice versa*. *Cf. Cleveland Pneumatic Tool Co.*, 142 N. L. R. B. No. 48, 53 LRRM 1025, with *Gas Service Company*, 140 NLRB No. 45, 52 LRRM 1037. See also *Newark & Essex Plastering Co.*, 121 NLRB 1094, 1109, n. 37" (SGB 23, n. 22).

IV. ALL THE POLICIES OF THE ACT BEARING ON THIS CASE SUPPORT THE RESULT BELOW

Respondent submits that the Act, taken as a whole, evidences a scheme of rights, obligations and procedures with which the relief sought by petitioner is completely inconsistent.

A. The Rights of the Engineering Laboratory Employees and Respondent's Pervasive Duty of Neutrality: Sections 7, 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1) and 8(b)(2)

Section 7 of the Act, its first substantive section, guarantees to employees the right to bargain collectively through representatives of their own choosing and to refrain from exercise of such right except to the extent that the right to refrain may be affected by a union shop agreement permitted by Section 8(a)(3), *viz.*, a union shop agreement which, among other things, runs in favor of a labor organization which is the representative of the employee as provided in Section 9(a) in the appropriate collective bargaining unit covered by the agreement containing the union shop clause. The employees of the engineering laboratory did not vote in the election in which IUE was chosen as representative of the production and maintenance unit, were not represented by IUE in the bargaining resulting in IUE Agreement and would not be represented in the contract arbitration which petitioner seeks in this proceeding. Such employees voted in the election in which Federation was chosen as representative of the salaried technical unit and were represented by Federation in the bargaining resulting in the Federation Agreement. It seems inconceivable that IUE should be able to obtain status as their bargaining agent and have the IUE Agreement applied to them by means of an arbitration award under the IUE Agreement. Respondent is legitimately concerned with protecting the statutory rights of these employees as a matter of company policy, as a matter of its statutory obligations and as a matter of avoiding liability to them. Neither opposing brief even mentions Section 7 or the rights or interests of the present employees of the engineering laboratory.

Sections 8(a)(1) and (3) forbid an employer to interfere with the exercise by its employees of the rights guaranteed them in Section 7 or to discriminate against an employee to encourage or discourage membership in any given union. Accordingly, respondent must be completely neutral in so far as the engineering laboratory employees may have exercised or may hereafter exercise their right under Section 7 to choose between the IUE and the Federation as their bargaining representative. Section 8(a)(2) forbids an employer to support any union, and respondent therefore may not lawfully assist either IUE or Federation to achieve representational status with respect to engineering laboratory employees. Indeed, an employer may not even recognize a union which has not established its majority status in respect of the employees involved; *ILGWU* v. *NLRB* 366 U. S. 731. How can respondent fulfill its pervasive obligation of neutrality? By vigorously defending the status quo in the arbitration proceeding petitioner seeks? By defaulting to petitioner's demands? By refusing to abide by an arbitration award? Until NLRB settles the matter, to the extent to which employees are not at work in the engineering laboratory because of their IUE status or their Federation status, has respondent discriminated against them in violation of the Act, thereby giving rise to claims for back pay?

Sections 8(b)(1) and 8(b)(2) forbid a labor organization to restrain or coerce the employees (or cause an employer to do so) in the exercise of their rights under Section 7. In a union shop situation, would not the relief IUE seeks from the arbitrator in this case tend to force the affected employees into the aggressor union in order to have some chance of saving their jobs (a compulsion only permissible if such union is the majority representative of a unit which, ***under the standards of Section 9***, includes such employees)?

B. The Duty to Bargain Collectively with the Majority Representative of an Appropriate Unit of Employees: Sections 8(a)(5) and 8(b)(3)

Section 8(a)(5) forbids an employer to refuse to bargain collectively with the representatives of his employees (subject to such representatives having been designated as such by a majority of the employees in an appropriate unit). Section 8(b)(3) conditions a union's duty to bargain collectively with an employer on the union's being the majority representative of such a unit of employees. If the production and maintenance unit should be deemed by the arbitrator under the IUE Agreement to include the engineering laboratory but thereafter be determined by an arbitrator under the Federation Agreement to exclude it, where would the IUE, the Federation and respondent stand in their obligations to bargain collectively? NLRB's eventual determination, necessarily inconsistent with that of one of the contract arbitrators, would, unless respondent correctly anticipates the agency decision, determine that respondent had breached its statutory duty in the interim.

If respondent should, pursuant to an award in a bi-lateral collective bargaining agreement arbitration, improperly (in the view of NLRB) recognize IUE in respect of the engineering laboratory instead of Federation (or vice versa), thereby committing an unfair labor practice, it is no defense that the recognition was made in good faith reliance upon the award even if respondent had resisted recognition vigorously before the arbitrator. See *Combustion Engineering Co.*, 86 N. L. R. B. 1265 (1949) and *UAW, Local 291*, 92 N. L. R. B. 968 (1950).

C. The Cornerstone of the Labor Relations Scheme of the Act Creating an area in which NLRB's Dispute Resolving Jurisdiction Preempts a Collective Bargaining Agreement Arbitration: Section 9

Section 9 requires that employees be grouped in appropriate units for bargaining purposes and provides that a majority of the employees in such a unit shall have the right to designate the bargaining representative for all the employees included. It further entrusts to NLRB a special function in determining the propriety of bargaining units "to assure to employees the fullest freedom in exercising the rights guaranteed" by the Act. References to, and requirements for, certification under Section 9 in respect of an appropriate unit are spread throughout the Act and the vast majority of the rights and obligations created by the Act depend upon compliance with Section 9. Section 9 and the NLRB functions thereunder seem fundamental to the entire scheme provided by the Act. Section 9 itself envisions inter-union rivalry, both in unit determinations and in elections, and accords to the expert agency the duty of final and universally binding determinations in this most sensitive area.

The NLRB discretion under Section 9 is the broadest conceivable administrative discretion. *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, and the over-all inference seems clear that disputes as to the coverage of units previously prescribed by NLRB and as to representational status were intended to be entrusted solely to NLRB. Indeed, an NLRB determination under Section 9 is not directly reviewable by the courts of appeals but can only be called into question in an enforcement proceeding with respect to a cease and desist order under Section 8; *AFL* v. *NLRB*, 308 U. S. 401; see also *Leedom* v. *Kyne*, 358 U. S. 184.

In the face of this, the opposing briefs argue (PB 17-20 and SGB 28-30 and 32-33) that Section 301 grounded arbitration of the instant dispute should be directed because (a) encouragement of collective bargaining necessarily requires encouragement of voluntary recognition, (b) if IUE were uncertified, it could obtain relief here only by petitioning for an election under Section 9 and the recognition clause of the collective bargaining agreement would involve only the intentions of the parties, (c) the contract grievance may be broader than the issues which NLRB can resolve under Section 9 and (d) NLRB would (or might) accept the award of the collective bargaining agreement arbitrator who, of course, would render his decision on the same federal law criteria which would govern agency decision.

The arguments founded on problems arising from voluntary recognition in uncertified units are far afield for this case has nothing to do with an employer's willingness to recognize absent certification or the enforceability of a collective agreement with an uncertified union or the necessity for verification of an uncertified union's majority status before agency clarification of its appropriate unit. As NLRB has noted "an employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of the unions until its right to be recognized has finally been determined under the special procedures provided in the Act", *Novak Logging Co.*, 119 N. L. R. B. 1573, 1574 (1958); see also *Midwest Piping and Supply Co.*, 63 N. L. R. B. 1060 (1945). In any event, both unions here are recognized pursuant to NLRB certifications and both are certified as representatives of workers in mutually exclusive units. Any adjudication of the scope of one unit necessarily affects the scope

of the other (and respondent can hardly "voluntarily" recognize both unions in respect of the engineering laboratory and its employees). It seems clear that the Act encourages voluntary recognition or readjustment of status thereunder only to the extent that the statutory rights of others are not thereby prejudiced.

While there is no requirement that bargaining be in the most appropriate unit or in the unit that the NLRB would have defined in the first instance, the IUE cannot thereby justify an attempt to modify the agency-defined unit of a third party not party to the IUE Agreement or to the arbitration demanded.

Petitioner urges recognition of private agreements because the parties are most "expert in their mutual determination as to what arrangements are appropriate to their needs (PB 18)". But in realizing the benefits of its collective expertise with respondent, IUE necessarily denigrates the similar collective expertise of Federation and respondent. The exclusive expertise of NLRB is certainly the intended method of resolving such disputes, at least absent an agreed upon method of resolution between all the real parties in interest, i.e., including Federation.

While a representation election is a condition precedent to the availability to an uncertified union of a "motion to clarify" under Section 9, it is difficult to find therein factors promoting industrial strife. The mere fact that "an established relationship" is reaffirmed on the basis of an NLRB certification is not of itself a source of strife and the reasoning of NLRB in declining to render clarifications of the scope of units defined solely by contract seems relevant here. In *Bell Telephone Co. of Pennsylvania*, 118 N. L. R. B. 371, 374-75 (1957), NLRB said:

> "We cannot believe that Congress, having specifically provided an effective procedure for defini-

> tive resolution of unit issues in Section 9(c)(1), at the same time intended to authorize the Board to derogate from that procedure in cases of this type by giving an advisory opinion which is not binding upon the parties or the Board, and where if one of the parties is dissatisfied with the Board's view, it could file a petition at an appropriate time covering all employees in the unit or a refusal-to-bargain charge seeking to obtain a redetermination of the status of the employees involved."

The arguments that Section 9 relief in representation disputes should not be exclusive because the contract grievance claim may be broader than the Section 9 issues, thus either depriving one of the rival unions of a forum in which to press all its claims or requiring two or more proceedings to realize a full remedy, are founded on hypothetical situations not responsive to the facts of this case for here the contract claim, however characterized, is no broader than the issue which would be submitted to NLRB under statutory procedures. If IUE is ultimately successful in its present claims, the engineering laboratory operations would, so far as labor relations are concerned, have to be integrated into the production and maintenance unit operations in respect of which the IUE Agreement and the applicable local supplement were drafted. The skill of the salaried technical machinists in the laboratory would, under Section XII (pp. 30-36) of the IUE Agreement, have to be weighed against the seniority of those presently represented by IUE. If new job classifications should be required, new agreements would have to be reached because the arbitration clause of the IUE Agreement withholds from the arbitrator the power to establish or modify job classifications (Section XIV-A. D (2), p. 43). All these specific controversies can arise if IUE is successful in the bi-lateral arbitration it seeks, and, should NLRB, when eventually faced with the

basic dispute, disagree, all prior contract arbitrations will have proved to be for naught.

The assertion that, in disputes of the present type, it is simpler and more expeditious to submit all the questions to a contract arbitrator does not seem to be grounded in realities, at least the realities of this case. If IUE is successful in its underlying claim here (whether before NLRB or the arbitrator under the IUE Agreement) there will come into existence the raw material for a host of individual arbitrations. The panoply of issues under the IUE Agreement allegedly more expeditiously settled by the contract arbitrator cannot be put before him in the instant grievance and, in any event, are all dependent upon the fundamental question of unit coverage (much as, in *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173, the question of the availability of state remedies was dependent upon a question of status).

Thus, the instant dispute almost inevitably will create the necessity for several further determinations and, since the rights of third parties are involved, must finally go to the NLRB whose adjudication may give rise to further contract arbitrations, proliferating the fragmentation of decision which the initial contract arbitration is, according to the opposing briefs, supposed to forestall. It clearly seems more complicating, more fragmenting, more aggravating, more time consuming (and *highly futile*) to postpone NLRB resolution. In the very situation envisioned in the brief of the United States (pp. 29-30) holders of disputed jobs transferred from one unit to another and, in the new unit, junior to other employees and hence subject to lay-off), there is not the slightest possibility of avoiding fragmentation of adjudication and a prolonged series of separate controversies. The engineering laboratory employees themselves could file unfair labor practice charges

alleging that their lay-offs were on account of their Federation membership. Even in the unlikely event that the Federation would follow the arbitration award interpreting the IUE Agreement as determinative of its rights, it cannot be seriously suggested that the laid-off employees ousted from their jobs would accept such an award.

The argument that the arbitration sought here could not result in conflict with the eventual NLRB determination of the IUE-Federation dispute because the agency will (according to petitioner) or might (according to the brief of the United States) defer to an arbitration award under the IUE Agreement is, or ought to be, unsound. The NLRB current policy of acceptance of arbitration awards has consistently been stated by the agency as totally inapplicable where a person whose rights were adversely affected was not party to the arbitration proceeding. See *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955); *Int'l Hod Carriers Union, Local 231*, 91 N. L. R. B. 598 (1950); *Int'l Longshoremen's and Warehousemen's Union*, 94 N. L. R. B. 388 (1951); *Local 825, Int'l Union of Operating Engineers*, 137 N. L. R. B. 1425 (1962).

Raley's Inc., 143 N. L. R. B. No. 40 (1963) is not to the contrary. When Raley's first hired full-time janitors and bottle-sorters it contracted with Building Service Employees as representative of the "new" unit. Retail Clerks, for some years the representative of all Raley's non-supervisory employees (other than meatcutters), objected and filed unfair labor practice charges alleging that the employer had assisted and dominated Service Employees. NLRB decided that Service Employees did not represent a majority of the janitors and, by settlement, it was agreed that the contract between Raley's and Service Employees was void and that Raley's would not recognize Service Employees as representative of the janitors absent certification. Raley's submitted to arbitration with Retail Clerks

whether the janitors and bottle-sorters were covered by the contract between them and the arbitrator ruled that they were. Service Employees then petitioned for a representation election among the janitors and bottle-sorters and NLRB dismissed the petition.

NLRB first stated that arbitration awards are considered by it when they meet the established tests of fairness and regularity. It went on to say: "It is true, of course, that under Section 9 of the Act the Board is empowered to decide questions concerning representation. However, this authority to decide questions concerning representation *does not preclude the Board in a proper case from considering an arbitration award in determining whether such question exists*" 1963 Daily Labor Report No. 128, p. D-2 (emphasis supplied). Accepting the award as the definitive interpretation of the *contract* between the parties, the "contract bar" rule (established by the agency to give effect to the policy favoring stable employer-union relations) required dismissal of Service Employees' petition for a representation election.

While Service Employees as a rival union and the janitors affected were not parties to the Retail Clerks' contract arbitration, neither was Service Employees the representative of any of the employees in question, since NLRB had earlier found that that union had been unlawfully assisted as a result of the company's extending recognition by agreement. Federation bears no such stigma, having been certified by NLRB as the representative of the salaried technical unit by virtue of an election in which the engineering laboratory employees voted.

Nor is *Pacific Tile and Porcelain Co.* (137 N. L. R. B. 1358 (1962)) to the contrary. NLRB there dealt with challenges to the votes of several hundred employees in a representation election (most challenges questioning whether economic strikers were "employees" entitled to vote

and whether replacements were in fact permanent replacements and entitled to vote). Two employees had been discharged prior to the election and their discharges had been passing through the grievance channels until such procedures were suspended by an economic strike. NLRB decided to allow the grievance and arbitration proceedings to determine the status of the two workers at the time of election. While the arbitrators' award could affect the final determination of the representation question, the arbitrator clearly was not determining a "representation issue".

The brief of the United States also seems to say (citing *Lincoln Mills, supra*) that collective bargaining agreement arbitrators will, when called upon to clarify NLRB certified units, apply the same criteria as those which govern the agency under the Act. While the right to arbitrate is, by virtue of Section 301, governed by the nascent body of federal law to be shaped by the courts in light of the overall scheme of federal labor relations legislation, an arbitrator clearly is not bound by "federal law". *Lincoln Mills* lays down rules for courts not for arbitrators and most arbitrators hold themselves unbound by "law", including in respect of the very matters in issue here; see *National Steel & Shipbuilding Co.*, 40 Lab. Arb. 625 (1963) and *Long Island News Corp.*, 35 Lab. Arb. 840 (1960). Arbitrators have noted that arbitration between one rival union and the employer of a work assignment dispute is undesirable, since they are really controversies between unions and bi-lateral awards only provoke grievances from the other union and fail to resolve the overall problem; see *Rayonier, Inc.*, 36 Lab. Arb. 883, 887 (1961). But when a collective bargaining agreement arbitrator is forced to do so, he typically conceives his function as one of pure contract interpretation (however sterile this approach to the problem may be); see *Houdaille Industries, Inc.*, 35 Lab. Arb. 455, 459 (1960).

D. Special Implications as to Representation Disputes: Section 10(a)

Section 10(a) provides that the power of NLRB to prevent unfair labor practices shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

The omission of any statement of the ultimately controlling authority of NLRB in the determination of units and the certification of bargaining representatives (except in the indirect sense that such matters may be in issue in unfair labor practice cases under Section 8(a)(5) and 8(b)(3)) hardly supports an inference that the agency's power under Section 9 *can* be affected by "other means of adjustment . . . established by agreement." The better inference seems to be that reference to NLRB authority as paramount to all other sources of authority in unit determination and certification matters would be superfluous because orderly procedure would not permit any competing adjudication.

E. Congressional Mandate for Protection of Employers and for Final and Binding Resolution of Inter-Union Disputes: Sections 8(b)(4), 10(k) and 303

Sections 8(b)(4) and 303 very clearly and forcefully attempt to protect an employer from the consequences of inter-union strife. They evidence a strong Congressional declaration that it is basically unfair for one union to attempt to carry the day against another union by assaulting the employer. As Sections 8(b)(4)(B) and (C) emphasize, this is particularly so when the union whose jurisdiction is being attacked is, but the aggressor union is not, the certified representative of the employees in issue. Congress has said that employers should be able to rely on NLRB certifications and unit determinations (as respondent did in entering into the IUE Agreement and the Federation Agreement, in each case agreeing to recognize the union for the units for

which it was certified by NLRB) *without harassment by any union discontent with its certification.* The reversal of the decision below, far from implementing that policy, would directly flaunt it by exposing respondent to a variety of direct and indirect injuries flowing from petitioner's quarrel with the Federation.

Petitioner (PB 17) suggests that the power of the courts under Section 303 to award tort damages for violation of Section 8(b)(4) indicates that it was not intended that the judicial jurisdiction under Title III was to be ousted by NLRB authority under Section 10(k). Putting aside petitioner's unwarranted focus on Section 10(k), it seems clear that while Section 303 gives a right to recover damages not available in an NLRB proceeding, it does not grant the courts (who award damages) the opportunity to duplicate the correlative administrative remedy (injunctive relief). Though the illegality of the acts sued upon in a Section 303 case is for the courts and not dependent upon an NLRB finding, *Int'l Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237, even conflicting awards by the court and the agency do not place the employer in the untenable position respondent would find itself here in the event of conflicting awards. Furthermore, Section 10(k) takes cognizance of situations not covered by Section 303 for the mere threat of conduct in violation of Section 8(b)(4), which would trigger agency action under Section 10(k), does not create a cause of action under Section 303, *Haspel* v. *Bonnoz, Singer & Hand Embroiderers Union*, 112 F. Supp. 944 (S. D. N. Y. 1953), and, in any event, such a threat would normally not give rise to damages.

The brief of the United States finds that Section 8(b)(4)(D), coupled with cases permitting employers to enforce no strike clauses under Section 301, demonstrates the inapplicability of the preemption doctrine here (SGB 14-15

and 25). The argument is that the strike in question may be cognizable by NLRB under Section 8(b)(4) and, since it is also cognizable by the courts (and contract arbitrators) under Section 301, there can be no greater reason to hold work assignment disputes and disputes over the coverage of certified units, to be within the exclusive jurisdiction of NLRB. This argument overlooks the fact that in the situations referred to there is neither actual nor potential inconsistency or any of the other undesirable consequences which would flow from reversal of the decision below. A no-strike covenant by a union can be violated and should be actionable whether or not the union's right to strike is also circumscribed by Section 8(b)(4)(D) and an arbitrator or a court may find a violation of the no-strike clause without the statutory legality or illegality of the strike being in issue. The true distinction between the cases cited in the brief of the United States and the present case is that the Section 301 adjudications there are the final and binding adjudications of contract issue which exists quite independently of any issue under Section 8(b)(4)(D), whereas in the present case the arbitrator's award (i) will be neither final nor binding but simply a first step, highly prejudicial to respondent, the employees affected and Federation, in the final and binding resolution which must eventually be made by NLRB and (ii) will purport to affect the NLRB determined units of IUE and Federation and the collective bargaining representation of the affected employees.

Section 10(k) provides that, upon a complaint that a union threatened to strike, or has struck, an employer to obtain a work assignment in violation of Section 8(b)(4)(D), NLRB shall hear and determine the work assignment dispute, unless within 10 days after notice of the filing of the charge the parties to the dispute submit to the agency satisfactory evidence that they have adjusted or agreed upon

methods for the voluntary adjustment of the dispute. Upon adjudication of the dispute by NLRB or its voluntary adjustment the agency is directed to dismiss the unfair labor practice charge.

While the opposing briefs emphasize the aspect of Section 10(k) favoring adjustment of disputes by the parties, it seems clear that, first and foremost, Section 10(k) reflects a Congressional policy that neutral employers shall be rapidly relieved of any sort of harassment from any union party to a work assignment dispute. Without conceding that the instant grievance should be treated as a "work assignment" dispute, respondent concedes that (i) a jurisdictional prerequisite to an NLRB work assignment determination is that at least a threat be made against the employer in violation of Section 8(b)(4)(D) (not an actual strike as stated in the opposing briefs) and (ii) it is undesirable that a union be forced to commit an unfair labor practice, however harmless, to obtain an NLRB work assignment determination. It does not thereby follow that Congress intended employers to be harassed by the demands of one of the rival unions for collective bargaining agreement arbitration, not binding on the other rival union.

The second important policy manifestation of 10(k) is that it is made obligatory on the Board to determine the dispute and even voluntary adjustment between the rival unions must come within 10 days in order to withhold such a determination. As the Court emphasized in *NLRB* v. *Radio and Television Broadcast Engineers*, 364 U. S. 573, Section 10(k) demands a *final and binding* resolution of a work assignment dispute. Interlocutory, inconclusive or procrastinating measures will not satisfy the urgent Congressional purpose. Certainly a contractual arbitration award between a neutral employer and the aggressor union, not in any way binding on the union under attack, does not

further that Congressional purpose and probably detracts from it.

The third clear policy emanation of Section 10(k) is that the adversaries in work assignment disputes should settle them or agree upon a method of settlement and, accordingly, such settlements and agreements should be encouraged in the overall federal labor scheme. Curiously, this policy emanation is relied upon by the opposing briefs in the face of their concession that the arbitration clause of the IUE Agreement does not constitute an agreed upon method for settling the present dispute within the meaning of Section 10(k). The concession, of course, is required by the obvious fact that Federation is a real party in interest in the dispute. Reversal of the decision below, far from encouraging the kind of agreements sought by Section 10(k), would affirmatively discourage them because an aggressor union will have nothing to lose and much to gain by seeking a collective bargaining agreement arbitration award of the work in question to the great prejudice of the rival union and solely at the expense of the employer. Indeed, the best method of encouraging the kind of work assignment agreement Congress saw as the only alternative to an agency determination of a work assignment dispute would be to refuse to permit the aggressor union to gain, however temporarily, any advantage from a collective bargaining agreement arbitration with the neutral employer.

F. Encouragement of Final and Binding Settlement of Inter-Union Disputes by Agreement between the Rival Unions: Sections 201, 203(d) and 301(a)

Sections 201, 203(d) and 301(a) evidence, and it has always been acknowledged by respondent in this case, a very clear and strong Congressional purpose favoring (i) resolution of "issues between employers and employees" by collective bargaining (Section 201(a)) and (ii) "[f]inal

adjustment by a method agreed upon by the parties . . . of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" (Section 203(d)). But the subject matter of this pervasive policy is labor-management relations, not relations between two rival unions and not disputes between two rival unions and the objective is a "final adjustment" of grievance disputes, not a non-binding interlocutory adjustment.

Where in these sections is the policy favoring arbitration under the IUE Agreement of a dispute which truly is between IUE and Federation, giving rise to an award which cannot bind the affected employees and Federation and which, far from being final, is precipitous of further controversy and further adjudications?

More relevant to this case is the policy reflected in Section 301(a), *viz.*, that agreements between labor organizations in respect of their interrelationships and disputes shall be enforceable and shall be governed by federal law. Congress clearly meant to encourage settlement of inter-union rivalries by inter-union agreements. While inter-union agreements may not affect the statutory rights of employees, they are certainly helpful in moderating inter-union rivalries. It does not seem to encourage such agreements to permit one rival union to gain strong tactical advantage over another through the device of a bi-lateral arbitration award interpreting the aggressor's collective bargaining agreement with the employer.

As the *Steelworkers* cases, *supra*, noted, arbitrations pursuant to collective agreements have a high place in the Congressional scheme for labor relations because such arbitrations are final and binding on the parties in interest and serve to allay industrial tensions and reduce industrial strife. This being the judgment embodied in Sections 201, 203(d) and 301, how can those Sections be read as decisive in re-

spect of the enforceability of a demand for an arbitration which cannot further the end result intended and, in fact, is antagonistic to that result?

To avoid the obvious dis-service to the Congressional policies relied on, the brief of the United States (SGB 19-20) suggests that perhaps the arbitrator under the IUE Agreement could force Federation into the proceedings so that it would be bound by the award (citing *National Steel & Shipbuilding Co.*, 40 Lab. Arb. 625 (1963)). But the *Steelworkers* cases teach that, under the scheme provided by the Act, the duty to arbitrate must be based on the consent of the parties—Section 301 provides for the enforcement of *agreements*. Federation has never agreed to arbitrate its jurisdictional differences with IUE (and it is interesting to note that IUE does not suggest that Federation be interpleaded) and any suggestion of non-consensual arbitration under the Act is patently unsound.

V. THE PRE-EMPTION CASES SUPPORT THE RESULT BELOW

The opposing briefs dismiss the pre-emption doctrine as nothing more than the proposition that the ". . . Act precludes the application of State statutes and common law doctrines regulating the conduct of employers, employees, and their representatives apart from a collective agreement. . . ." (SGB 8) (see also PB 12).

The quoted description of the pre-emption doctrine expresses the result reached from application of the doctrine but does not advert to its underlying principle, focus on which is necessary to apply the doctrine in novel situations.

A. The Principle Underlying "Pre-emption" Cases

While *Garmon* and related "pre-emption" cases certainly support the frequently articulated proposition that

States are not free to act in respect of conduct which is arguably protected or prohibited by Sections 7 and 8 of the Act, they also expose the underlying *principle* of the pre-emption doctrine. It is not an independent judge-made proposition, but a judicial effort to give effect to legislative intent. The basis for the rule of *Garmon* and similar cases is a necessary inference from the Act either that Congress specifically did not intend the particular type of controversy over which another forum seeks to exercise jurisdiction to be resolved by such processes (whether judicial or administrative) or that, in light of the over-all scheme contemplated by Congress, a proper allocation of powers among the various institutions concerned with labor relations excludes action in a particular type of case by other than NLRB.

As Professor Summers of the Yale Law School recently stated to the ABA Labor Relations Law Section:

> "The central question in every pre-emption and primary jurisdiction case must be, what roles did Congress intend should be played by the various legal institutions in handling this particular matter?" (Daily Labor Report No. 168, Aug. 28, 1963, p. 3).

Accordingly, the pre-emption cases are relevant here to discern the type of situation which gives rise to an inference of NLRB exclusivity and to evaluate the instant case on that basis.

B. The Pre-emption Doctrine and Section 301

Professor Summers' paper, referred to above (which is shortly to be published) relates the pre-emption doctrine, analyzed in terms of the overall intent of the Act, to the questions left open by *Smith v. Evening News*.

> "The cases of this Term make clear that the *Garmon* formula ["arguably protected or pro-

hibited"] cannot bind the many brambles of pre-emption and primary jurisdiction. Indeed, when applied other than to protect unions in their use of economic force from state restrictions, the *Garmon* formula may impale us on the terms. Three examples are enough. In *Smith* v. *Evening News*, individual employees brought suit claiming that their employer had violated the provision in the collective agreement prohibiting discrimination for union activity. The Michigan court, dutifully applying *Garmon*, held that because the conduct alleged was an unfair labor practice, exclusive jurisdiction was in the NLRB. The Supreme Court reversed baldly declaring that *Garmon* had no application in such cases. Said the Court:

> "'The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301.'

The soundness of the Court's result only underlined the inadequacy of [the] *Garmon* [formula], and though we are not told the premises from which the Court proceeds we know that the premises are not those articulated in Garmon. . . .

"These three cases [Professor Summers' discussion of *Incres Steamship Co.* v. *I. M. W. U.*, 372 U. S. 24, and *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746, are omitted from this excerpt since they involve pre-emption problems not directly relevant here] lay bare the immediate source of our difficulty —not all preemption problems are of the same piece and not all can be resolved by a single formula . . .

"The problems of preemption and primary jurisdiction have as their common source the complex process of allocating governmental powers and functions among federal and state authorities, and among

courts and administrative agencies. In the area of labor relations with which we are concerned, the making of this allocation rests ultimately with Congress. The central question in every preemption and primary jurisdiction case must be, what roles did Congress intend should be played by the various legal institutions in handling this particular matter. . . . Determining the allocation intended by Congress is not always a simple process for Congress frequently fails to address itself directly to the problem. The courts must then make the allocation which, with due regard to the federal system, will best comport with the structure of the statute and fulfill the various purposes of Congress. The inquiry, therefore, cannot be directly into how Congress intended to allocate powers. In most cases that is a will-o'-the-wisp. Rather, the critical inquiry is what allocation by the Court will achieve the substantive results sought by Congress. . . .

". . . .

". . . In *Smith* v. *Evening News,* the problem is one of allocation between courts and the NLRB, both acting as instrumentalities of the federal government applying federal law. Considerations of federalism do not enter, and the question might be cast in more positive terms of how the roles of these agencies can be coordinated to best achieve the purposes of Congress. There are, however, two bodies of substantive rules, those of the statute and those of the collective agreement. We are again confronted with the problem of allocation of power to make the applicable rules. But the Congressional preference here is clear and strong. One of the central purposes of the Act is to create a structure of private regulation through the collective agreements. That purpose is fulfilled only if the substantive rules and procedural devices established by the parties are applied. The private processes are preferred and should have full play unless they clearly contravene substantial policies of the Act. And even where these private

processes, which are themselves the fulfillment of Congressional policy, contravene other policies there remains the question of what allocation of powers and functions will achieve in largest net measure the various policies of the Act. This analysis solves easy cases like *Smith* v. *Evening News*, but gives at most some general guides for more difficult cases like *I. B. E. W.* v. *Raytheon* which the Court narrowly escaped confronting by the fortuitous settlement of the parties." [Bracketed material supplied by respondent]

C. Factors Relevant to Whether Congress Intended NLRB Exclusivity

1. Adjudications of Status under the Act Consistently Held Within Exclusive Jurisdiction of NLRB

Decisions in favor of NLRB pre-emption invariably result where the competing forum would be called upon to adjudicate a fundamental statutory status, *e.g.*, certification as a collective bargaining representative (*Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767 (arising under the Wagner Act)), propriety of units and certification of their collective bargaining representatives (*LaCrosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18), status of a union as a "labor organization" within the meaning of the Act (*Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173) or whether a workman is an "employee" or a "supervisor" within the meaning of the Act (*Local No. 207, Int'l Ass'n of Bridge Workers Union* v. *Perko*, 373 U. S. 701).

Those threshold questions under the Act must, it is inferred, be decided nationally on a uniform basis by the specially expert federal agency charged with the overall implementation of statutory policy. Questions of status under the Act, particularly certification as bargaining representa-

tive of an appropriate unit of employees, are fundamental to the entire complex of statutory rights and obligations and their resolution gives rise to far-reaching consequences under the statutory scheme. It is therefore inferred that all such resolutions are much more likely to have been intended by Congress to be within the exclusive province of its expert agency (in contrast to the inference appropriate in the case of resolution of the kind of *ad hoc* issue which arises from conduct which may give rise to the relatively routine unfair labor practice complaint, such as whether employees X, Y and Z were discharged because of union activity and hence entitled to reinstatement and back pay).

2. Adequacy of Administrative Remedy Supports Inference that Dispute Within Exclusive Jurisdiction of NLRB

In *Garner* v. *Teamsters Union*, 346 U. S. 485, the Congressionally-provided remedies against coercive picketing were found adequate and, hence, to preclude state relief against the same conduct notwithstanding the fact that the state scheme was virtually identical with that established by the Act. See also *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (absence of damage remedy under the Act supports inference that Congress did not intend to preclude damage action under state law) and *Int'l Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (where NLRB action under Act capable of awarding back pay to employee illegally expelled from the union but state law also provided for reinstatement, it should not be inferred that Congress intended to deprive the employee of the latter remedy).

3. Interest of Other Institutions in Ordering Conduct in Labor Dispute Bears on Congressional Intention as to NLRB Exclusivity

The strength of the interest of the competing institution (*e.g.*, the strong State interest in preventing violence

and protecting property), is relevant to whether the Act should be read as reflecting an intention to permit vindication of the interest in fora other than NLRB. See *Allen-Bradley Local No. 1111, United Electrical Workers* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (arising under the Wagner Act). *Internat'l Union, U. A. W.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245; *U. A. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266. Where such interest is relatively weak as opposed to the public interest in nationally uniform and coherent implementation of the substantive policies of the Act, NLRB exclusivity should be inferred (see *Weber* v. *Anheuser-Busch Inc.*, 348 U. S. 468).

4. Attitude of NLRB toward Exercise of its Jurisdiction Irrelevant to Whether such Jurisdiction Exclusive

The fact that NLRB may decline to exercise admitted jurisdiction over labor disputes does not warrant an inference of Congressional intention to permit other institutions to determine such disputes; *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 and *Amalgamated Meat Cutters Union* v. *Fairlawn Meats, Inc.*, 353 U. S. 20.

D. The Foregoing Criteria Support a Strong Inference that Congress Intended the Instant Dispute to be Determined Solely by NLRB

As has been shown in the preceding sections of this brief, (i) the dispute in the instant case raises a fundamental issue as to the status of IUE as opposed to the status of Federation as bargaining representative of the engineering laboratory employees and as to the content of the two NLRB determined units involved, (ii) the Act provides an adequate

means for the resolution of this dispute and for according to IUE the ultimate relief it seeks and (iii) collective bargaining agreement arbitration, as an institution in the Congressionally conceived scheme of national labor relations, has no interest in resolving inter-union disputes, whereas the public interest in a final resolution, which only NLRB can provide, binding on both unions and protecting the rights of affected employees is enormous. NLRB's position (SGB 31) that arbitration under the IUE Agreement might (fortuitously) lighten its case load, or temporarily postpone an increase in its case load; is irrelevant.

Whether or not, strictly speaking, the result below should be expressed in terms of "preemption", the preemption cases provide a forceful analogy supporting affirmance. Without reliance on any "doctrine" the decision below should be affirmed on the basis that the overall scheme of the Act requires that the instant dispute be resolved by NLRB to the exclusion of an arbitrator under the IUE Agreement.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the judgment below should be affirmed.

JOHN F. HUNT, JR.,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Attorney for Respondent

JAMES F. SMITH,
3 Gateway Center,
Pittsburgh 30, Pa.

CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Of Counsel.

September 27, 1963.

APPENDIX

In addition to the sections of the Labor Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136-62, as amended by Act of September 14, 1959, 73 Stat. 525-45, 29 U. S. C. Sections 141 *et seq.*) set forth in the Appendices to petitioner's brief and the brief of the United States (*viz.*, Sections 8(a)(5), 8(b)(4)(i)(D), 9(a), 9(b), 9(c), 10(a), 10(k), 201, 203(d) and 301(a)), the following sections of the Act are involved in this case:

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

SECTION 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to

confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SECTION 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

* * *

SECTION 303(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

* * *

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the

representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

* * *

[1]So in original. Probably should read "of".

Office-Supreme Court, U.S.
FILED
NOV 16 [illegible]
JOHN F. DAVIS, CLERK

No. 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*,

v.

WESTINGHOUSE ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
1126 16th Street, N. W.,
Washington, D.C. 20036
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway,
New York, New York.
Of Counsel.

INDEX

	Page
Argument	1
Introduction	1
I. There Is No Basis for Denial of Court Jurisdiction To Compel Arbitration	2
A. The Reservation in *Smith* v. *Evening News* Need Not Be Reached in This Case	3
B. The Preemption Doctrine Is Inapplicable	7
C. There Is No Policy Disclosed by the Act Which Precludes Arbitration in This Case	9
D. The Possibility of a Conflicting Claim of Another Union Does Not Warrant Demand of Arbitration	14
II. Affirmance of the Decision Below Would Be Contrary to Federal Policy Relating to Enforcement of Arbitration Agreements and Would Deprive Unions of Enforcement of Important Substantive Rights	16
A. The Decision Below Would Impair Enforcement of Arbitration Agreements Generally	16
B. The Grievance Dispute To Be Arbitrated Is a Contract Dispute Between Petitioner and Respondent for Which the National Labor Relations Act Provides No Relief Before the Board and Which Involves Important Contractual Rights	17
1. The Dispute To Be Arbitrated Is Between Petitioner and Respondent and Not Between Petitioner and Another Union	18
2. Determination of Petitioner's Claim of Contractual Breach Is Unavailable Before the Board	22
3. Respondent Seeks To Preclude Enforcement of Important Contract Rights	27
Conclusion	30

CITATIONS

Cases:

	Page
Carey v. *General Electric*, 315 F. 2d 499	6, 7, 8, 13, 16, 17
Denver-Chicago Trucking Company, Inc., 132 NLRB 1416	27
Douds v. *International Longshoremen's Assn.*, 241 F. 2d 278 (C.A. 2)	10, 12
Gas Service Co., 140 NLRB No. 45	23
Guss v. *Utah Board*, 353 U.S. 1	8
Hercules Motor Corporation, 136 NLRB 1648	27
Highway Truckdrivers & Helpers, Local 107, (Safeway Stores, Inc.), 134 NLRB 1320	24
Houston Chapter, Associated General Contractors, 143 NLRB No. 43	29
I.L.G.W.U. v. *N.L.R.B.*, 366 U.S. 731	11
I. Oscherwitz & Sons, 130 NLRB 1078	27
Int'l Longshoremen's Association, 118 NLRB 1481	10
Local 3, Metal Polishers Union (Cleveland Pneumatic Tool Co.), 142 NLRB No. 48	24
McDonnell Aircraft Corp., 109 NLRB 930	27
Midwest Piping & Supply Co., 63 NLRB 1060	13
Mine Workers v. *Arkansas Oak Flooring*, 351 U.S. 62	12
Montgomery Ward & Co., Inc., 101 NLRB 418	27
N.L.R.B. v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (C.A. 7), setting aside 103 NLRB 1750	13
N.L.R.B. v. *North Electric Co.*, 296 F.2d 137 (C.A. 6), setting aside 129 NLRB 675	13
N.L.R.B. v. *Radio & Television Engineers*, 364 U.S. 573	25
Novak Logging Co., 119 NLRB 1573	13
Pittsburgh Valve Co. v. *N.L.R.B.*, 234 F. 2d 565 (C.A. 4), setting aside 114 NLRB 193	13
Plumbers' Union v. *Borden*, 373 U.S. 690	8
Renton News Record, 136 NLRB 1294	29

Page

Retail Clerks Local Union No. 324 (Vincent Drugs No. 3, Inc.), 144 NLRB No. 108 ..... 12, 13
Retail Clerks v. *Thriftimart, Inc.*, 380 P.2d 652 13
Sheet Metal Workers Int'l. Assn., Local 272, etc. (Valley Sheet Metal Co.), 136 NLRB 1402 26
Smith v. *Evening News Ass'n.*, 371 U.S. 195 ..... 2, 3, 6, 14
Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 ..... 6, 16, 18
Steelworkers v. *Enterprise Corp.*, 363 U.S. 593 ..... 6, 18
Steelworkers v. *Warrior & Gulf Co.*, 363 U.S. 574 18
Tacoma Printing Pressmen's Union No. 44 (Valley Printing Co.), 131 NLRB 1090 ..... 14, 26
Teamsters & Truck Drivers, Local 70 (Hills Transportation Co.), 136 NLRB 1086 26
Teamsters Union v. *Oliver*, 358 U.S. 283 ..... 10, 29
Telegraphers v. *Chicago & N.W. R. Co.*, 358 U.S. 283 29
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 29
Westinghouse Electric Corp., 144 NLRB No. 49 ..... 6, 27
Whitehouse v. *Illinois Central R.R. Co.*, 349 U.S. 366 7
Wood, Wire & Metal Lathers Int'l. Union, Local No. 328 (Acoustics & Specialties, Inc.), 139 NLRB 598 26

Other Authority:

5 *Corbin on Contracts*, West Publishing Co., 1951 15
Carroll L. Coburn, *A Union View of Automation*, N.Y.U. Fourteenth Annual Conference on Labor 313 29
Frederick R. Livingston, *An Approach To Automation*, N.Y.U. Fourteenth Annual Conference on Labor 301, Matthew Bender & Co., 1961 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 21

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*,

v.

WESTINGHOUSE ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

Introduction

This case concerns the enforcement of the arbitration provisions of a collective bargaining agreement. Section 301 of the Labor Management Relations Act of 1947 was enacted for the express purpose of providing a means for enforcement of collective bargaining agreements, and federal policy particularly favors enforcement of obligations to arbitrate. Only two reasons can justify refusal to enforce such an agreement—that the courts lack jurisdiction or that the agreement is void because it violates public

policy. Respondent utterly fails to establish that either ground is present in this case.

Its contentions reduce to a plea that it be relieved from its contractual obligation to arbitrate because an award might result in hardship to Respondent. But alleged hardship to Respondent, here by no means certain or even probable, is no justification for avoidance of contractual obligations.

Respondent ignores the hardship to a union which would ensue from denial of its contractual right to arbitration. Such denial would not only weaken the overall structure provided for enforcement of agreements to arbitrate, but would also wipe out the fruits of collective bargaining in a vital contract area.

I. There Is No Basis for Denial of Court Jurisdiction to Compel Arbitration.

Respondent's position with respect to *Smith* v. *Evening News Association*, 371 U.S. 195, and the preemption decisions of this Court is not without ambiguity. At the outset, Respondent appears to contend that this case is to be considered in the light of the possible exception to the general rule set forth in *Smith* that jurisdiction under § 301 is not to be denied by virtue of concurrent NLRB jurisdiction over the subject matter involved in a claimed contractual breach. Thus, Respondent states that "one of the situations reserved in *Smith* v. *Evening News* must now be resolved" (Resp. Br. p. 13). Later in its brief Respondent argues that the arbitration should be denied on the basis of the much broader preemption doctrine on the ground that Congress intended the Board to have exclusive jurisdiction over the grievance dispute (Resp. Br. pp. 38-44).

But Respondent concludes (Resp. Br. p. 45):

> "Whether or not, strictly speaking, the result below should be expressed in terms of 'preemption,' the preemption cases provide a forceful *analogy* supporting affirmance. Without reliance on any '*doctrine*' the decision below should be affirmed on the basis that the overall scheme of the Act requires that the instant dispute be resolved by the NLRB to the exclusion of an arbitrator under the IUE Agreement." (Emphasis added).

Respondent's hesitancy to embrace either the possible *Smith* exception, or the preemption decisions, as governing this dispute stems, not from any argumentative inability, but from its realization virtually conceded in its final sentence that no "doctrine" can be applied to this case which would result in affirmance of the decision below.

A. *The Reservation in Smith* v. *Evening News Need Not Be Reached in this Case.*

The decision of this Court in *Smith* left little ambiguity that if, in the future any basis should arise for denying enforcement of a collective bargainging agreement under Section 301 because of collision with the functions of the NLRB under the National Labor Relations Act, such denials would occur because the dual jurisdiction of the courts and the Board, which Congress intended under Section 301 and Title I of the Labor-Management Relations Act, might give rise to an existing serious problem which could not otherwise be resolved. The Court stated: "If, as Respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an

unfair labor practice, *we shall face those cases when they arise.*" 371 U.S., at 197 (Emphasis added).[1] Respondent has failed to demonstrate that such serious problems have arisen in this case.[2] Its parade of "foreseeable consequences" which will "almost inevitably" or "almost unquestionably" result from arbitration (Resp. Br. 14, 16, 28) is dependent on a pyramiding of assumptions—as to the facts which will be developed in arbitration, as to the outcome of the arbitration, as to its own conduct, as to the conduct of the Federation, and as to the legal posture of the parties in the event that its assumptions of the facts were to materialize. Its entire argument is built on speculation. It can not and does not point to a single concrete serious problem which will arise simply because arbitration is ordered in this case. The worst that will then happen will be that an arbitrator will hear and determine the issues in this case. What happens thereafter will depend upon the

---

[1] It is clear, and Respondent does not appear to contend otherwise, that the *Smith* decision does not establish that arbitration is to be denied if such a serious problem is encountered.

[2] In approaching the situations reserved in *Smith*, Respondent asserts that regardless of the nature of the grievance, "critical to the decision here is the nature of the dispute in terms of the stated objective of the grievance, available remedies under the Act, impingement on the statutory rights of the employees affected, impact on the two rival unions and the employer and the foreseeable consequences of bilateral collective bargaining agreement arbitration as opposed to NLRB determination." (Resp. Br. 14). Petitioner cannot agree that these considerations are all relevant, let alone critical. By Respondent's own statement (Resp. Br. 12) the critical consideration is whether serious problems will arise from the arbitration of the grievance in the light of the concurrent jurisdiction of the Board, and, if so, how those problems are to be resolved. But even if Respondent's list of critical considerations were all deemed pertinent, their application confirms the error of the decision below. As we show herein, the objective of the grievance is to cure the violation of the agreement; there are no available remedies for that violation under the Act; arbitration of the grievance will not infringe statutory rights; and the impact of arbitration on the two unions and the employer and foreseeable consequences of bilateral arbitration give rise to no present serious problems and at worst are sources of speculation.

ultimate combination of the myriad possibilities with respect to the facts, the conduct of Respondent, of Petitioner, of the Federation, and of the Board and the courts should there be resort to either or both thereafter.

For example, Respondent here contends that serious problems will arise because of Section 7 rights of employees which it asserts Petitioner and the Government have ignored and which will be affected "Under any comprehension of the underlying grievance" and "the ruling of a contract arbitrator." (Resp. Br., 14-16.) This contention is not only wrong on the law, as demonstrated below, but rests on the multiple assumption that IUE seeks, through arbitration, representation rights for employees who are not appropriately included in its unit without affording them an election to which they are entitled.[3] But these assumptions go to the merits of the grievance and the appropriate remedy if one is warranted. Both are as yet undetermined, and are the very issues for an arbitrator to decide. If the grievance has merit, then the assumption that the employees are entitled to an election requires more than mere assertion to sustain it.

Respondent's assertion that it could not comply with any award without risking violations of Section 8(a)(5) and Section 8(b)(3), or unspecified charges and damage actions by employees, similarly depend upon successive unwarranted factual assumptions—that IUE will receive an award entitling it to representation rights for the engi-

[3] Respondent's argument is based on the assumption among others, contrary to the record, that Petitioner seeks to represent all Engineering Laboratory employees, without regard to whether they were transferred from the production and maintenance unit or whether they perform production and maintenance work. See n. 16, *infra*. Respondent also assumes that the IUE unit excludes, and the Federation unit includes, the Engineering Laboratory as such. But neither the units as described by the Company at the time of certification nor those agreed upon by contract draw a distinction on location or departmental lines. The distinction is drawn on the basis of function (R. 13, 27, 30).

neering laboratory employees regardless of the merits of its grievance, that the Federation will seek and receive a similar award, that Respondent will be defenseless to a refusal to bargain charge by the unions whose award is not complied with, and that other undisclosed grounds for action against Respondent will exist (Resp. Br. 17, 23). The multiple assumptions are not only speculative and unsupported, but are entirely self-serving, for as Respondent concedes, any substantial fears of such exposure could be tested by refusal to comply with an award when its terms are known (Resp. Br. 17). See also *Westinghouse Electric Corp.*, 144 NLRB No. 49.

Even assuming, without conceding, that the IUE's grievance improperly seeks recognition for engineering laboratory employees, it does not follow that the arbitrator will grant that remedy or that he is powerless to fashion a remedy which he finds appropriate under all the circumstances if he finds that the grievance has merit. See *Steelworkers* v. *Enterprise Wheel Corp.*, 363 U.S. 593. The issue here is whether the grievance raises an arbitrable question which ought to be arbitrated, not whether a remedy has been requested which can or should be granted.[4]

The short answer to all Respondent's speculations is that the direction of arbitration and rendering of an award in itself will give rise to none of the problems raised by Respondent. The possible exception to *Smith* does not concern itself with "fear of possible conflict" which "can

---

[4] Should the arbitrator find that Respondent violated the agreement, the arbitrator has broad discretion as to the relief, if any, he may award. He may require the return of work to the unit; he may require that certain jobs in the engineering department be considered as part of the bargaining unit; or the relief may take alternative forms. See *Carey* v. *General Electric Company*, 315 F. 2d, at 507-508: "Arbitration may well contribute to industrial peace even if it results in the arbitrator's determination that he can make no valid award because of limitations upon his authority, or that the employee has no case on the merits." See also *United States Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568.

easily be exaggerated" *Carey* v. *General Electric Co.*, 315 F.2d 499, at 509 (C.A.2), but with the existence of actual conflict raising serious problems. Only when such problems are demonstrated need their consequences be faced. Indeed, Respondent's present predictions of dire collisions of rights if arbitration should proceed are no different from the unsuccessful effort in *Carey* v. *General Electric Co., supra,* to resist arbitration on the asserted ground that a grievance to be arbitrated sought to compel the Company to violate Section 8(a)(3) of the Act. The Second Circuit rejected the asserted conflict as "conjectural" noting that there were many possible resolutions which would not violate the Act. The Court stated:

> "Only if none of these approaches is adopted by the arbitrator would it become necessary to determine whether a court should enforce an award that clearly compels an unfair labor practice. To do so now would be to 'raise an unfair labor practice question prematurely and gratuitously'. . ." 315 F. 2d, at 512.

The possible injuries which would result from proceeding with arbitration are "too speculative" to warrant denial of enforcement of the arbitration agreement. *Whitehouse* v. *Illinois Central R.R. Co.*, 349 U.S. 366, 371-373.

B. *The Preemption Doctrine Is Inapplicable*

Respondent's efforts to apply preemption theory to this case, in the face of insurmountable odds, fail to meet the obvious arguments against its application to contract enforcement under Section 301. Application of the preemption doctrine would lead to wholesale exclusion of cases from contractual enforcement on the grounds of arguable NLRB jurisdiction (See Pet. Br., p. 24), a result clearly at odds with *Smith*. Respondent's last resort analogy to

the preemption cases would read into Congress' intent to make the NLRB the exclusive agency to enforce federal policy vis-a-vis the states, the intent to subordinate federal court contract enforcement authority under Section 301 to NLRB jurisdiction, in the face of its express intent to place contract enforcement in the courts rather than the Board.[5] See *Plumber's Union* v. *Borden*, 373 U.S. 690, 693, n. 3.[6] The asserted analogy between this case and the preemption decisions, which Respondent asserts but does not develop or explain, does not exist.

"The Supreme Court has all but sounded the death-knell of the theory of exclusive NLRB jurisdiction in cases arising under Section 301 of the Labor-Management Relations Act." *Carey* v. *General Electric Co.*, 315 F. 2d, at 508. Respondent furnishes no reason to revive it.

---

[5] Respondent's reliance on the *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 is misplaced. Under *Guss*, state courts or administrative agencies could not acquire jurisdiction *they lacked* merely because the Board declined to assert its exclusive jurisdiction. But here it is relevant to consider whether federal court jurisdiction which *exists* under Section 301 to enforce contracts should be exercised in the light of practical difficulties which might result from referral to the Board and the possibility that some disputes might otherwise go unresolved. See *Carey* v. *General Electric Co.*, 315 F. 2d, at 509.

> "The fact that the Board's docket is notoriously overcrowded and that Board decisions are often slow in coming, that the remedies which the Board may fashion are often inflexible, that time limitations or jurisdictional restrictions may effectively eliminate the possibility of administrative action, and that the grant of a hearing in any event is wholly within the discretion of the General Counsel of the Board—all of these factors are incompatible with an assertion that courts or arbitrators must necessarily be deprived of jurisdiction over disputes which in some form or other trench upon the possible, but as yet unexercised, use of power by the National Labor Relations Board."

[6] The Summers article, quoted at length by Respondent, gives little support to its position. Thus, the concluding portion of his statement as quoted confirms a Congressional policy to prefer "private processes" which "should have full play unless they clearly contravene substantial policies of the Act." It confirms also that even where there is an actual conflict of policy, the question remains as to how it is to be resolved. (Resp. Br. 41-42).

C. *There Is No Policy Disclosed By The Act Which Precludes Arbitration in This Case*

Respondent's policy emanations from Sections 7, 8, 9 and 10, and Titles II and III of the Act, which it asserts establish an intent to entrust the underlying grievance dispute solely to the NLRB are neither of the spirit nor of the flesh. All studiously ignore Congress' intent to provide for enforcement of collective bargaining agreements under Section 301, and the fact that the dispute to be arbitrated is between Petitioner and Respondent (See pp. 18-22, *infra*; Pet. Br. 14-15). The policy arguments are heavily intermixed with and difficult to separate from Respondent's persistent speculations as to the dire nature and results of arbitration.[7] But taken alone, the policies Respondent gleans from the cited sections of the Act would be of sweeping application and would seriously restrict contract enforcement.

Respondent asserts that Section 7 rights would be infringed by arbitration because the only means by which IUE can achieve the objective of its grievance is a proceeding under Section 9, and that it would be unlawful for the Union to insist Respondent bargain with it with respect to this objective (Resp. Br. 15-16). These contentions are based upon a misconception of both Sections 7 and 9.

Indeed, if the Board could place the engineering laboratory employees in the IUE unit through amendment of the certification without an election, as Respondent claims

---

[7] Thus, in connection with the Section 9 argument, the assumption throughout is that the remedy will affect the scope of bargaining units (Resp. Br. 25-26), that the remedy will affect statutory rights (Resp. Br. 26), that success in arbitration will result in merger of the entire engineering laboratory operations in the production and maintenance unit (Resp. Br. 27), that the award will give rise to new disputes (Resp. Br. 28-29), and that NLRB proceedings would remedy the contract violation alleged in the grievance. (Resp. Br. 28-29).

(Resp. Br. 17-18), it is immediately apparent that there is no reason to assume without proof that an identical determination by an arbitrator interpreting the collective bargaining agreement would violate Section 7 rights. The only authorities cited for Respondent's assertion that such an award would be repugnant to the policies of the Act, are two companion cases,[8] arising out of the same facts, in which the union in negotiations insisted as a condition of agreement upon expansion of its recognition to a unit of substantially greater geographic scope than that for which it had bargaining rights. There was no question in that case as to whether a group of employees came within the scope of the unit for which the union was certified and entitled to bargain. Interpretation of an existing recognition agreement was not involved, and the vice flowed not from the Union's request to enlarge its unit, but from its refusal to bargain on any other terms.

It is Respondent who has ignored the Section 7 rights of its employees. For Section 7 confers upon employees the right "to bargain collectively through representatives of their own choosing . . . for the purpose of collective bargaining or other mutual aid or protection," and that right includes the right of the employees represented by Petitioner to bargain as to work performed and employment outside the unit in order to protect the wages, hours and working conditions of those within it. *Teamsters Union* v. *Oliver*, 358 U.S. 283, 293-295. Clearly the right to enforce the bargain struck cannot be contrary to policy if the very policy cited grants the right to bargain to reach it.

Respondent's evaluation of Section 7 rights furthermore treats the present circumstances, which Petitioner claims are in violation of its agreement, as the status quo which

[8] *Douds* v. *Int'l. Longshoremen's Ass'n.*, 241 F. 2d. 278 (C.A. 2); *Int'l. Longshoremen's Ass'n.*, 118 NLRB 1481.

Petitioner seeks to disturb in violation of Section 7 rights (Resp. Br. 22). But for purposes of the grievance, the status quo is that which was changed by the unilateral acts of Respondent which Petitioner contends were in violation of contractual rights. To the extent that restoration of the status quo involves Section 7 rights, it involves the mere undoing of any infringements of employee rights which may have accompanied the claimed contract violation.[9]

The Section 7 contentions in conjunction with the assertion of possible violation of Section 8(a)(1)(2), and (3) and 8(b)(1) and (2) are subject to the same infirmities (Resp. Br. 21-22).[10]

Respondent asserts that from Section 9 "The overall inference seems clear that disputes as to the coverage of units previously prescribed by NLRB and as to representational status were intended to be entrusted solely to NLRB" (Resp. Br. 24), and further, "The only legal means by which IUE can seek the objective of its grievance is a proceeding under Section 9 of the Act" (Resp. Br. 15). These contentions are completely unsupported by Section 9 or any other authority.

The procedures established by Section 9 were intended

[9] In this connection, Respondent's asserted interest in remaining neutral and protecting employee rights conveniently ignores that its unilateral acts lie at the base of Petitioner's grievance (Resp. Br. 21).

[10] There is neither evidence nor basis for presuming that the Union's effort to enforce its agreement are motivated by the union activities of employees. The only authority cited by Respondent for the proposition that it must remain neutral, *I.L.G.W.U.* v. *N.L.R.B.*, 366 U.S. 731, is not even remotely related to the assertion for which it is cited. There is no question here as to whether the interpretation of the IUE unit to include the disputed employees would result in IUE becoming a minority union which could no longer deal with the employer. Even Respondent in its construction of the grievance does not read it as seeking representation and bargaining for the engineering laboratory employees as a separate unit in which the union had not established its majority status. That this is the only alleged authority Respondent can cite under a statute more than 25 years old is some measure of the merit of its contention.

to provide a means for establishing representational status where it could not be achieved through voluntary recognition, not as a means of policing the composition of bargaining units. As this Court held in *Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, "Section 9(c) . . . does not make it a condition that the representative . . . shall be certified by the Board, or even be eligible for such certification." 351 U.S. at 71-72, "The Act does not . . . require prior resort to a Board determination whenever the *parties* establish an appropriate bargaining unit." *Retail Clerks Union, Local No. 324 (Vincent Drugs No. 3, Inc.)* 144 NLRB No. 108. (Emphasis in original) Nor is it material that the Board may once have certified the Union as the majority representative in an appropriate unit. Indeed, in *Douds* v. *Int'l. Longshoremen's Ass'n.* supra, upon which Respondent relies, the court stated:

> "Finally, [the Board's decision as to appropriate unit] may be altered by agreement of the parties, if the process of alteration involves no disruption of the bargaining process or obstruction on commerce and if the Board does not disturb the agreement in a subsequent representation proceeding." 241 F. 2d., at 282.

Certainly, if parties can agree to alter the unit, they can agree to the means to interpret their agreement as to unit, and the assertion that the possible result is itself necessarily repugnant to the Act is without foundation. See also Pet. Br. 18. Respondent does not seem to take issue with the right of parties to agree to arbitrate disputes over unit where only a single established unit is involved (Resp. Br. 29-30). Thus, its contention that the Board's jurisdiction under Section 9 is exclusive appears to be limited to the case where two unions with separate established units are

involved.[11] Such a policy manifestation cannot stem from any policy disclosed by Section 9, but only from Respondent's assertion that in such circumstances the dispute "must finally go to the NLRB." (Resp. Br. 28). Thus, the truncated policy argument under Section 9 is really another version of the argument that serious problems will arise if arbitration is enforced, and is in error for the same reasons.

If Respondent's policy arguments which it seeks to derive from Sections 7 and 9 were to be sustained, of necessity their application could not distinguish between cases where one union is involved and cases where two unions are involved. For unrepresented employees are given Section 7 rights to refrain from union activity, just as represented employees are protected in engaging in such activity, and Section 9 policy and procedure applies to all questions concerning representation and not merely those where more than one union is involved. Indeed, the absence of such distinction discloses that the assault on arbitration in this case extends far beyond its circumstances. See *Carey* v. *General Electric Co.*, 315 F. 2d, at 508; *Retail Clerks* v. *Thriftimart, Inc.*, 380 P. 2d 652; pp. 28-29, *infra*.

There is no evidence that Section 10(k) together with Section 8(b)(4)(D) was intended to protect neutral employers from "any sort of harassment from any union

---

[11] The Board's *Novak Logging Co.*, 119 NLRB 1573, and *Midwest Piping and Supply Co.*, 63 NLRB 1060, cited as authority for the policy of Section 9 are not only completely inapplicable on the facts and the law, but represent an application of the Act which is far from settled. See *N.L.R.B.* v. *North Electric Co.*, 296 F. 2d 137 (C.A. 6), setting aside 129 NLRB 675; *Pittsburgh Valve Co.* v. *N.L.R.B.*, 234 F. 2d 565 (C.A. 4), setting aside 114 NLRB 193; *N.L.R.B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (C.A. 7), setting aside 103 NLRB 1750.

The reliance on these decisions underscores the frailty of reliance upon the possible resolution by the Board of hypothetical situations as a basis for denial of arbitration.

party to a work assignment dispute" (Resp. Br. 35), and the suggestion that efforts to arbitrate a grievance constitutes "harassment" displays a misunderstanding going beyond these sections. Likewise, there is no policy demanding final determinations of work assignment disputes under Section 10(k). Sections 10(k) and 8(b)(4)(d) reflect a policy of discouraging work assignment disputes which result in actual or threatened work stoppages or coercion of employers, and not an intent to produce final and binding determinations of all work assignment disputes. Indeed, proceedings under Section 10(k) do not result in such determinations. See *Tacoma Printing Pressmen's Union No. 44 (Valley Printing Company)*, 131 NLRB 1090. Respondent's suggestion (Resp. Br. 36) that Section 10(k) indicates a policy to discourage arbitration here so that tripartite arbitration may be encouraged ignores in addition, as does Respondent's brief consistently, the possibility that arbitration will have salutary effects, and instead focuses on the worst that may ensue.

Likewise Respondent's inversion of Section 201, 203(d), and 301(a) (Resp. Br. 36-38) to indicate a policy of denial of arbitration here is not only unwarranted, but ignores that it is the contract dispute which Petitioner seeks to arbitrate.

The feeble and speculative policy emanations on which Respondent relies are not of the stuff which denials of contractual rights are forged.

D. *The Possibility of a Conflicting Claim of Another Union Does Not Warrant Denial of Arbitration.*

Respondent speculates upon the possibility that an arbitration award in this case in favor of Petitioner may give rise to a counterpart proceeding by the Federation under its agreement, and assigns this as a reason for concluding that "a serious problem" within the meaning of *Smith* has

arisen in this case. (Br. pp. 16-17). This asserted problem arises, not out of the concurrent jurisdiction of the Board and the Courts, but out of the concurrent contracts of the two unions. Thus, it falls completely outside the category of problems which this Court in *Smith* reserved for future consideration. Nor should it constitute grounds for denial of arbitration.

Assuming that conflicting awards are among the possible consequences of enforcement of the obligation to arbitrate, the remedy does not lie in denial of arbitration and permitting the Company to act unilaterally without regard to its obligations under either of the agreements which may give rise to the conflict.

As in the case of other claimed serious problems, raised by Respondent, this problem is speculative and need not be faced until and unless it arises. At present, neither union has an award. If the Company succeeds in persuading an arbitrator that it did not violate its agreement with Petitioner, the possibility of conflicting awards is at an end. Furthermore, until the facts found by the arbitrator, the grounds of his decision, the remedy awarded, and the Federation's position are known, there is no reason to presume that the Federation will challenge compliance with an award in favor of the Union, or seek arbitration of the issue under its agreement, or that if it does, it will win.[12]

If the spectre of conflict should ultimately materialize, it is then time to apply for relief, for such relief can be much better fashioned when contractual obligations have been properly defined, and the nature of the problem and of the

[12] It is possible in a rare case that conflicting agreements may exist justifying conflicting awards. In that event, a question of remedy may arise, but it does not follow that no remedy should be available to either party, or that their contracts should be ignored leaving the offender free to act unilaterally. This problem is not unique to labor relations. See 5, *Corbin on Contracts*, § 1169, pp. 735-736 West Publishing Company, 1951.

conflict are precisely known. See *Carey* v. *General Electric*, supra, 315 F.2d, at 512(C.A. 2) [13]

II. Affirmance of the Decision Below Would Be Contrary to Federal Policy Relating to Enforcement of Arbitration Agreements and Would Deprive Unions of Enforcement of Important Substantive Rights.

A. *The Decision Below Would Impair Enforcement of Arbitration Agreements Generally.*

In its efforts to shore up the decision below with the sounds of preemption and exclusivity, Respondent has given no heed to the impact of its repairs upon the availability of Section 301 for enforcement of contract arbitration generally. Respondent would apply *Smith* on the basis of possible, but hardly certain, disastrous collisions, or it would apply preemption or analogize it, (without setting forth the mechanics of the analogy), or it would dismiss this suit without any "doctrine." But in its negativism it provides no clue as to the impact of its "doctrines", or "no doctrines", upon the general scheme of enforcement of arbitration generally. Certainly the basis of decision advanced below, and indeed any basis suggested, would thwart the policy of *Steelworkers* v. *American Manufacturing Company*, 363 U.S. 564. Pet. Br. pp. 23-25. Affirmance on any of the grounds advanced by Respondent would promote the search for a federal question in every grievance which a recalcitrant party to an arbitration agreement sought to avoid arbitrating and the "strong emphasis, placed upon arbitration as a means of peacefully and expeditiously resolving labor disputes . . . might be

---

[13] The Government brief, pp. 19-21, suggests possible anticipatory means to avoid conflicting awards, at the same time pointing to possible difficulties inherent in them. The Union believes that it is unnecessary to consider in this case the questions thus raised. See Resp. Br. 38.

immeasurably frustrated." *Carey* v. *General Electric Co.* 315 F. 2d, at 509.

Moreover, Respondent, by focusing only on possible problems which might arise following arbitration, ignores the benefits which can flow from arbitration, even in the context of the present case. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564. "Although the ideal solution of the grievance would bring both conflicting unions before a single tribunal . . . arbitration between one of them and the employer may nonetheless be a force for industrial peace." *Carey* v. *General Electric Co.*, 315 F. 2d, at 511.

In the light of the federal policy favoring enforcement of arbitration provisions of collective bargaining agreements and the fact that arbitration itself can result in no serious problem which cannot be dealt with as easily after arbitration has occurred, there can be no justification for denying arbitration in this case.[14]

B. *The Grievance Dispute To Be Arbitrated Is A Contract Dispute Between Petitioner and Respondent For Which the National Labor Relations Act Provides No Relief Before The Board and Which Involves Important Contractual Rights.*

Respondent persistently seeks to equate the existing two-sided contractual question between Respondent and Petitioner with a three-sided dispute which does not now, and may never, exist. Respondent argues that since the National Labor Relations Board might resolve the three-sided dispute, if brought before it, Petitioner has lost its right to enforcement of its contractual rights. Thus for a de-

[14] Indeed, Petitioner is unable to conceive of any context in which the enforcement of the obligation to arbitrate would give rise to a serious problem arising out of a conflict with NLRB jurisdiction which would require resolution in advance of arbitration.

termination of Petitioner's contract rights, it would substitute a noncontractual determination of a different dispute by the Board. It would justify the substitution on the grounds that both forms of proceedings are methods of resolving disputes, and it would ignore the important contractual rights lost in the substitution.

1. *The Dispute To Be Arbitrated is Between Petitioner and Respondent and Not Between Petitioner and Another Union.*

Respondent in its brief consistently states the facts underlying the grievance in the version most favorable to its position, ignoring the questions of fact to be resolved in arbitration which the limited record as to the underlying grievance reveals, as well as one critical fact undenied on this record. Whether Petitioner's factual allegations will ultimately be sustained or not is immaterial to the outcome of this case. What is material, however, is whether Petitioner is entitled to an opportunity to establish its facts and support its contentions before an arbitrator. Certainly the rule of construction in the *Steelworkers'* cases entitles Petitioner to have the arbitrability of its grievance judged on its claim and not on the basis of Respondent's defense to its claim.[15]

Respondent asserts that IUE by its grievance seeks to extend "IUE's representation status to a new group of employees who have not chosen IUE as their bargaining representative" and thus to enlarge its present unit by adding to it the entire engineering laboratory, (Rep. Br. p. 13, 15, 27), and that IUE is an "aggressor union" attacking the jurisdiction of the Federation which is "the certi-

[15] *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582, 585; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593.

fied representative of the employees in issue" by "assaulting" the employer, which is cast in the role of an innocent "neutral." (Resp. Br. p. 32-36).[16] The dispute is described as "truly . . . between IUE and Federation." (Resp. Br. p. 37). These assertions and characterizations are unsupported. By them Respondent seeks to hide an important contractual dispute, which exists whether or not the Federation also has a claim to pursue.

Despite Respondent's strong protests that the record establishes this as a certification grievance in which the work assignment issue is "new wine" (Resp. Br. 13-17), the record establishes that the work assignment element of the grievance has been in the case all along and is uncontested by Respondent.

In the petition in the New York Supreme Court which initiated this action, Petitioner's general statement of its grievance (R. p. 12-13) described the question of application of the agreement and the claimed violation alleged—not the underlying facts and not the nature of the remedy sought.[17]

---

[16] Respondent's characterization of IUE's grievance in its brief as an attempt to add the entire engineering laboratory to its bargaining unit in the face of a conflicting Federation certification is refuted by Company documents and statements in the record. In denying arbitration, Respondent's Arbitration Representative stated that the grievance pertained to "certain employees in the Enginering Laboratory." (R. 16). Its affidavits are to the same effect (R. 29).

[17] Respondent asserts that Petitioner consistently described its grievance "as a protest of Respondent's refusal to apply the IUE Agreement to the engineering laboratory employees (Br. p. 5). But as indicated in the portion of the IUE affidavit which Respondent quotes, Petitioner consistently asserted that the grievance "merely involves a violation by the Company of the rights of the Union to represent the employees who perform production and maintenance work". This is a statement of the violation alleged not the remedy sought, and under the contract it is the claim of violation which makes the grievance arbitrable, not the remedy sought. Respondent's assertion that Petitioner seeks "the benefits of the contract for employees" transferred to the engineering laboratory, quot-

Respondent in answer described the grievance as seeking the inclusion of certain Engineering Department employees in the IUE unit (R. 20).[18] It filed a supporting affidavit setting forth the history of the two units at Baltimore and asserting that the Union sought to represent employees performing certain operations in the salaried unit represented by the Federation. The affidavit made no averment as to the nature of the work performed by these employees (R. 26-31).

Petitioner's affidavit in reply (R. 35-36) stated the Union's claim and strenuously objected to the characterization of the grievance as a "certification grievance." It pointed out that Petitioner claimed a violation of its contractual rights by virtue of two interrelated actions of the Company: (1) the transfer of production and maintenance *work* from the bargaining unit to the engineering laboratory and (2) the transfer of production and maintenance *workers* from the bargaining unit to the engineering laboratory. This affidavit again described the claimed violation without specifying the remedy sought.

By further affidavit, Respondent took vigorous exception to Petitioner's claims as to number of employees transferred.[19] But no issue was taken with the claim that pro-

---

ing a phrase from an affidavit in support of the petition, and that this means that IUE seeks to represent employees in the Engineering Laboratory, takes the quoted phrase out of context to suggest that the grievance was directed at a specific remedy (Resp. Br. p. 6). It is descriptive of the effect of the violation, not the remedy sought for it (R. 36).

[18] The Company at all times has sought to mask the ambiguity of the actual grievance statement (R. 41) by correcting its syntax to make the grievance read in essence "the employees (who) are performing certain operations should be in the IUE unit." But the syntax may be as easily corrected to read "the employees are performing certain operations (which) should be in the IUE unit."

[19] This disagreement is immaterial to the question of arbitrability. Respondent, in reply, also disputed that the grievance involved interpretation, application, or claimed violation of the Agreement, an issue no longer in the case. See "Question Presented" (Resp. Br. p. 2).

duction and maintenance work was moved into the laboratory. (R. 39-41). Thus, on the record the issue of work assignment is not only of respectable vintage, but virtually conceded as a part of the facts out of which this grievance arises.

Significantly, Respondent's Sur-reply affidavit also makes no claim that the Federation would assert the right under its certification or contract to perform the production and maintenance work which was transferred to the engineering laboratory. (R. 39-41). Indeed, Respondent's description of the Federation unit in its initial affidavit in opposition as excluding employees who perform work for the purpose of production and maintenance, leaves in doubt whether such a right could or would be claimed by the Federation. (R. 27). While the Federation may not have rejected the gratuitous windfall wafted in its direction by the Company's unilateral transfer of work, there is no evidence that it has claimed the work as work to which it is entitled, and there is not even an allegation of rival claims by the two unions for the performance of this work.[20]

Thus, Respondent's efforts to substitute the Federation for itself as the Union's real antagonist ignore the record and distort the underlying grievance. The underlying grievance arises out of Respondent's conduct for which it must answer under its contract, and not out of any dispute between rival unions in which Respondent is a passive neutral.

Even if the grievance involved only transfer of employees without work and were accurately described by

[20] With respect to the Federation, in Respondent's affidavit in opposition, it alleged only that if the Company treated the *employees* in the Engineering Lab as covered by the IUE contract, the Federation "could" make out the same claim for arbitration. Respondent was silent as to what the Federation could or would do in its reply to the Hockenberry affidavit which raised the undenied allegation with respect to work assignment.

Respondent, it is the position of the parties that the outcome should be the same. (Resp. Br. 13). As we have indicated, Petitioner takes this position because, regardless of the characterization of the grievance, there is no cause to deny the Union the right to enforcement of its contract (Union Br. 15-20).[21] But, we have answered Respondent's assertions as to the character of the grievance because we believe that this area of disagreement between Respondent and Petitioner underscores that Respondent's invitation to the courts to intervene to relieve it of its agreement to arbitrate is premature and harmful. Moreover, however the facts develop in arbitration and whatever problems may develop in the future as to remedy, Petitioner has a right to have an arbitrator determine whether or not its agreement has been violated. Respondent is silent as to its reasons for denying Petitioner such determination, and would substitute for it noncomparable procedures.

2. *Determination of Petitioner's Claim of Contractual Breach Is Unavailable Before the Board*

Respondent asserts that "relief" can be had in a Section 9 proceeding. But Respondent avoids comparison of the relief available in a Section 9 proceeding involving a certification dispute with relief available in a contract arbitration. Indeed, such a comparison must be avoided if Respondent's contention is to be accepted, for until an ar-

---

[21] If the outcome were dependent upon the characterization of the grievance, then it would be necessary to try in court, in advance of arbitration, not only the question of whether the grievance overlapped in any respect with matters cognizable by the Board, but the exact nature of the overlap, necessitating a complete trial on the facts and inevitably involving the courts in the question of remedy, for the character of the grievance and of its overlap cannot be determined until the remedy is known. See p. 6, *supra*. Respondent's independent reliance on Section 9 suggests that its agreement that outcome of this case should not depend on the character of the grievance may be qualified (Resp. Br. 24-31).

bitrator has acted, there is no contractual relief to be compared, and it necessarily follows that the relief before the Board may differ substantially from that which would be available in arbitration.

Petitioner submits, moreover, that there is in any event a critical difference between arbitration and a proceeding before the Board which would deny it any determination of the contractual breach it seeks to arbitrate.

Respondent concedes that in a Section 9 proceeding the Board will not go behind an employer's assignment of work tasks (Resp. Br. p. 18-19). Instead, it will determine the appropriateness of the unit on the basis of the tasks as assigned, presuming the right of the employer to have made the assignments before it. On the basis of those assignments, if may determine the unit placement of the employees, but it will not determine how the tasks should be assigned.[22]

Thus, to the extent that an arbitrator might award a reassignment of work, such relief is unavailable under Section 9. But even if the prospective relief awarded by the arbitrator were in the same form as a Board's determina-

---

[22] Any inference to the contrary to be drawn by Respondent's quotation from a footnote in the Government's brief (Resp. Br. p. 20, quoting S.G. Br. p. 23, n. 23), is quickly dispelled by a reading of the *Gas Service Company* case cited therein. As the Board stated therein: "Thus, it is now clear that the Petitioner in effect is asking the Board to assign to employees in the unit represented by the Petitioner certain of the work now being done by employees in the Pipeline Division. However, work assignment disputes are not properly matters for consideration in representation proceedings. As the Board has said, its sole function in representation proceedings is to ascertain and certify the name of the bargaining representative, if any, that has been designated by the employees in the appropriate unit. It is not the Board's responsibility in representation proceedings to decide whether employees in the bargaining unit are entitled to do any particular work or whether an employer has properly reassigned work from employees in the bargaining unit to other employees. Accordingly, the Petitioner's motion, insofar as it requests the Board to assign certain work to employees in the certified unit, is hereby denied." 140 NLRB No. 45, at pp. 3-4.

tion in a Section 9 proceeding, the Board, unlike the arbitrator, would not determine whether the collective bargaining agreement was violated and would leave the contractual claim, unanswered with any past breaches unremedied. Respondent's silence as to the distinction between the contractual basis of an arbitration award and the noncontractual basis of Board action cannot obscure its existence and significance.

Respondent concedes that it would be undesirable to force the Union to commit an unfair labor practice, "however harmless", to obtain a work assignment determination by the NLRB (Resp. Br. 35). Respondent's reliance on Sections 8(b)(4)(D) and 10(k) arises instead in connection with its assertion that the Board will afford "relief" for work assignment disputes in representation cases, (Resp. Br. 20),[23] and that as such relief is available in Section 10(k) proceedings, it must be available in Section 9 proceedings.

Apart from the fact that the relief in the Section 9 proceeding is not the same as that under Section 10(k),[24] there is substantial doubt whether the Board would view the instant dispute between the Union and the Company as a violation of Section 8(b)(4)(D) had it struck or threatened to strike to regain the production and maintenance work. In *Highway Truckdrivers and Helpers, Local 107, (Safeway Stores)*, 134 NLRB 1320, the Board quashed a notice of hearing under Section 10(k), following the de-

---

[23] As indicated above, the Board consistently declines to assign work in representation cases. While parties may occasionally raise work assignment questions in representation proceedings, requiring the Board to consider such questions in that context, it is clear that the relief available in one type of proceeding is not available in the other, and nothing in the government brief suggests the contrary. Compare *Local 3, Metal Polishers Union (Cleveland Pneumatic Tool Co.)*, 142 NLRB No. 48, with *Gas Service Company*, 140 NLRB No. 45, quoted in n. 22, *supra*.

[24] See notes 22, 23, *supra*.

cision of this Court in *N.L.R.B.* v. *Radio & Television and Broadcast Engineers Union Local 1212*, 364 U.S. 573. In the *Safeway* case the dispute was created by the conduct of the employer in transferring the work from a unit represented by one union which sought to keep it, to another unit represented by another union which "did not press . . . for the work." Construing the decision of this Court in *N.L.R.B.* v. *Radio & Television Engineers*, 364 U.S. 573, the Board held:

> "The thrust of the *CBS* decision, was to be sure, directed at the Board's misconception of the kind of determination required by Section 10(k). But, in terms, the Supreme Court said it was 'The Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision'. 364 U.S. 573, at 585. Implicit in this directive is the proposition that Section 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved. Certainly it was not intended that every time an employer elected to reallocate work among his employees or supplant one group of employees with another, a 'jurisdictional dispute' exists within the meaning of the cited statutory provisions." 134 NLRB at 1322.

With respect to the facts the Board held:

> "It is apparent that the dispute here is not in its very nature the kind that Congress devised Section 10(k) to resolve. In the normal situation, the Section 10(k) proceeding is designed to determine which of two competing employee groups is entitled to do the disputed

work. In the normal situation also, the employer is willing to assign the work to either group if the other will just let him alone. We do not mean to suggest that this is the only kind of situation where Section 10(k) is applicable. But the normal situation demonstrates how far removed is the instant case where the employer by his unilateral action created the dispute, by transferring work away from the only group claiming the work. We venture the suggestion that nothing in the lengthy legislative history of the jurisdictional dispute provisions can be read as suggesting that Congress conceived this as the type of dispute to which those provisions were to be regarded as applicable." 134 NLRB, at 1323.

See also *Teamsters & Truck Drivers, Local 70 (Hill Transportation Co.)*, 136 NLRB 1086; *Sheet Metal Workers Int'l. Assn.*, 136 NLRB 1402; *Wood, Wire & Metal Lathers International Union*, Local No. 238 *(Acoustics & Specialties, Inc.)*, 139 NLRB 598.

Moreover, despite Respondent's stress on the asserted absence of a final and binding determination in arbitration as a reason to deny arbitration, even if the Board were to consider a strike or threat to strike, in support of the Union's grievance as a violation of Section 8(b)(4)(D), a determination under Section 10(k), while binding on the Unions, is not binding upon the employer. Assuming the Board awarded the work to Petitioner, the employer would not be compelled to obey the award, and the Union would be free merely to strike in support of its claim. *Tacoma Printing Pressmen's Union No. 44 (Valley Printing Company)*, 131 NLRB 1090. Nor would Respondent be restrained by a Section 9 determination from removing work or employees from a bargaining unit. Thus, proceedings under the Act are neither dispositive of the contract dis-

pute, nor final and binding upon an employer as to the disputes they resolve.

Thus, Respondent's claim that final and binding relief is available before the Board for the contract violation is without foundation.[25]

3. *Respondent Seeks to Preclude Enforcement of Important Contract Rights*

The dispute which Respondent seeks to hide goes to the heart of Petitioner's rights to preserve the wages, hours and working conditions of its members.[26]

Respondent attempts to minimize the significance of its agreement to recognize Petitioner by asserting, without any record support, that there was no bargaining with either Petitioner or the Federation with respect to Respondent's recognition obligations. Its asserts further that, in accordance with the scheme of representation and bargaining established industrial unionism, the recognition clauses do not purport to assign work but only describe the classes of work performed in the respective units. (Resp. Br. 5). These gratuitous intimations of frivolity, echoing the discarded *Cutler-Hammer* doctrine (*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564) are more appropriate for argument

---

[25] Respondent does not contend that "relief" would be available to Petitioner in a proceeding pursuant to Section 8(a)(5), and it is clear that the Board would dismiss any charge of violation of Section 8(a)(5) raising a question of contract interpretation which could be resolved through the grievance procedure. *Montgomery Ward & Co.*, 137 NLRB 418; *Hercules Motor Corp.*, 136 NLRB 1648; *Denver-Chicago Trucking Co.*, 132 NLRB 1416; *I. Oscherwitz & Sons*, 130 NLRB 1078; *McDonnell Aircraft Corp.*, 109 NLRB 930.

[26] Respondent's asserted "neutrality" and its branding of Petitioner as an "aggressor" in a dispute over recognition may be tested by asking the question: Would Respondent be "neutral" if the Federation agreed with Petitioner that its grievance had merit and that the remedy should be recognition of Petitioner for the employees in the engineering laboratory? Compare *Westinghouse Electric Corp.*, 144 NLRB No. 49.

in the arbitration proceeding than in the determination as to whether the grievance should be arbitrated. But Respondent's sterile characterization of the recognition clause, and inferentially of the substance of the grievance dispute is also without justification.

The recognition clause is what gives life and meaning to every other provision of the collective bargaining agreement, for frequently only the recognition clause insures that the standards of the agreement will not be undermined by assigning the duties of the employees to whom it is meant to apply to other employees. To the extent that an employer is free to have bargaining unit work performed by employees to whom the agreement does not apply, every term and condition bargained for by the union is in jeopardy. Thus, it is beside the point whether or not the parties bargained over Respondent's recognition obligations. What is critical is that all bargaining was dependent upon Respondent's concurrent agreement to recognize the Petitioner (See Resp. Br. pp. 21-23), and the significance of the claimed violation in this case is not reducible to a mere question of remedy.

Moreover, whether or not the recognition clause in this case has the significance which Petitioner claims is immaterial. For Respondent's attack goes beyond this clause and beyond the case in which two unions are actually vying for the same work or employees. Respondent's policy arguments necessarily encompass efforts to enforce clear and unambiguous agreements which seek to protect bargaining units against erosion through product change, technological change, automation, or the mere availability of a labor source which will work on more favorable terms. Respondent's assertion that Section 9 gives the Board exclusive jurisdiction over a dispute which arises over a unilateral transfer of work or employees outside the bargain-

ing unit is but an attempt to build into all agreements an automatic management rights provision voiding any agreement the parties may have reached among themselves to the contrary.

But protection against such erosion is the daily concern of collective bargaining,[27] and denial of enforcement of the bargains arrived at would inevitably result in "industrial strife and unrest" obstructing commerce which is the policy of the Act to eliminate. Section 1 of the Act.

Since the decision in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, this Court has unfalteringly given the fullest play to Section 301 in enforcing collective bargaining agreements in fulfillment of the Congressional intent. No occasion is presented here for a first backward step to create an exception which Respondent can neither justify nor formulate.

---

[27] See *Telegraphers* v. *Chicago and N.W. R. Co.*, 362 U.S. 330; *Teamsters Union* v. *Oliver*, 358 U.S. 283; *Renton News Record*, 136 NLRB 1294, 1297; *Houston Chapter Associated General Contractors*, 143 NLRB No. 43; Sen. Rept. No. 1308, 84th Cong., 2d Sess., p. 12 (1956); Frederick R. Livingston, *An Approach To Automation*, N.Y.U. Fourteenth Annual Conference on Labor 301, Matthew Bender & Co., 1961; Carroll L. Coburn, *A Union View of Automation*, N.Y.U. Fourteenth Annual Conference on Labor 313.

Conclusion

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
1126 16th Street, N. W.,
Washington, D.C. 20036
Attorneys for the Petitioner.

ISADORE KATZ,
1501 Broadway,
New York, New York.
Of Counsel.

(9245-2)